TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted] 35

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, PETITIONER,

vs.

DAVID FRUCHTER, AN INFANT, BY JENNIE FRUCHTER, HIS GUARDIAN *AD LITEM*.

No. [redacted] 36

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, PETITIONER,

vs.

SAM FRUCHTER.

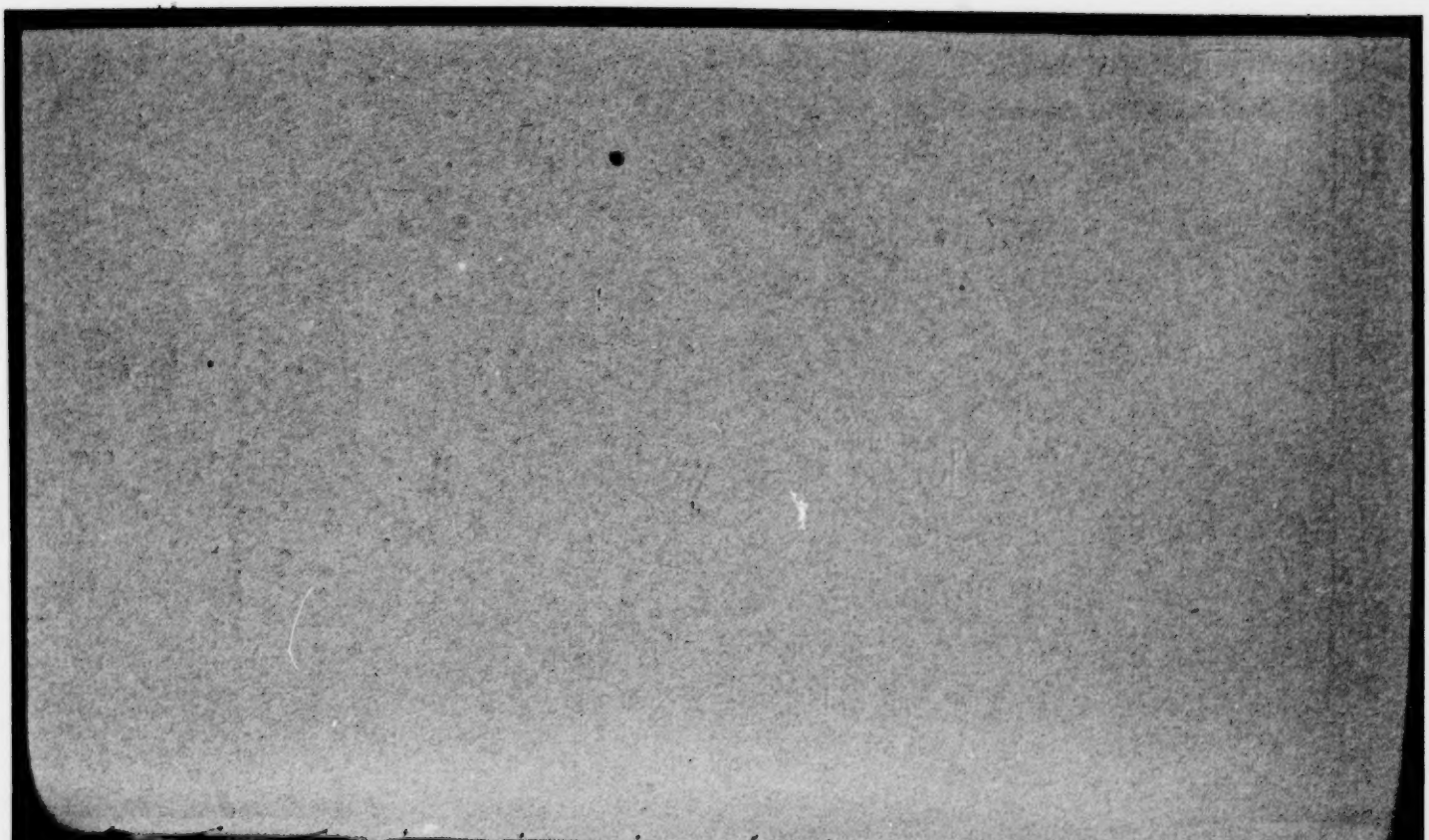
ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED FEBRUARY 28, 1921.

CERTIORARI AND RETURN FILED APRIL 20, 1921.

(28,123)

(28,124)



(28,123)

(28,124)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 237.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, PETITIONER,

vs.

DAVID FRUCHTER, AN INFANT, BY JENNIE FRUCHTER, HIS GUARDIAN *AD LITEM*.

No. 238.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, PETITIONER,

vs.

SAM FRUCHTER.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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1 United States Circuit Court of Appeals for the Second Circuit.

CASE OF SAM FRUCHTER.

Summons.

Supreme Court, New York County.

SAM FRUCHTER, Plaintiff,

against

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's attorney within twenty (20) days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, January 11th, 1917.

LEON SANDERS,
Plaintiff's Attorney.

Office and Post Office Address, No. 217 Broadway, New York City.

2 *Complaint.*

United States District Court, Southern District of New York.

SAM FRUCHTER, Plaintiff,

against

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

Plaintiff, for his amended complaint, alleges:
For a first cause of action:

First. That on or about June 9th, 1916, plaintiff's son, David Fruchter, was an infant, aged seven years.

Second. That at all the times hereinafter mentioned, plaintiff was and still is entitled to the services of his said son, David Fruchter, who was and is a minor, under the age of twenty-one years, and who resided and still resides with plaintiff.

Third. On information and belief, that at all the times hereinafter mentioned, defendant was and still is a foreign corporation, organized and existing under and by virtue of the laws of the State of Connecticut.

Fourth. On information and belief, that at all the times hereinafter mentioned, and for many years prior thereto, defendant has continuously been engaged in maintaining and operating as a
3 common carrier of persons and freight, a railroad line through the State of Connecticut to and into the City of New York and in connection therewith and as a part of said system did build a certain bridge across and above its tracks at 149th Street, which is a public highway, in the Borough of Bronx, City of New York, and as a part of said bridge and railroad system and public highway, did incorporate certain signal erections or structures, access to which was obtained from the ground by a flight of steps consisting of trellis work constructed from the ground to said signal erection or structure.

Fifth. On information and belief, that said bridge work and the steps in the said trellis work were so close together and the lowest one was at or so near the ground, that a child could easily walk or ascend from the ground to the top of said structure, by stepping from one rung in the trellis work to the other.

Sixth. On information and belief, that the maintenance of the aforesaid steps in the trellis work in the aforesaid manner on said bridge was not usual or customary among companies engaged in business similar to that of defendant and operating the same with due regard to the rights of the public.

Seventh. On information and belief, that at all the times hereinafter mentioned, said trellis work and the aforesaid steps thereon constituted an attraction to children, and in the usual course of events, were likely to tempt children to approach the same and children were naturally and instinctively drawn toward and climbed upon the same.

4 Eighth. On information and belief, that at all the times hereinafter mentioned, defendant did not warn boys in the neighborhood of said bridge against going upon the aforesaid trellis work, or prevent their going upon the same.

Ninth. Upon information and belief, that at all the times hereinafter mentioned, the boys in the immediate neighborhood surrounding said bridge, were in the habit of climbing upon the aforesaid trellis work and steps, of all of which defendant, its agents, servants and employes had, or in the exercise of reasonable care should have had due notice.

Tenth. On information and belief, that at all the times hereinafter mentioned, defendant maintained a certain electric cable attached to and suspended in and about said bridge, at a point adjacent to or within a child's arm's length from the top of said trellis work,

which said cable was charged with a high, intense and deadly volume and current of electricity.

Eleventh. On information and belief, that on or about the 9th day of June, 1916, the aforesaid cable was not sufficiently, properly nor carefully insulated nor covered nor protected, and was therefore dangerous to the life and limb of anyone coming upon the aforesaid trellis work.

Twelfth. That on or about the 9th day of June 1916, and for some time prior thereto, plaintiff's said son resided with plaintiff at No. 630 Concord Avenue, Borough of Bronx, City of New York, which was in the immediate vicinity of the aforesaid bridge.

5 Thirteenth. On information and belief, that on or about the 9th day of June, 1916, plaintiff's said son, with other boys in the said neighborhood, was playing on said bridge at or near the aforesaid trellis work, and climbed upon the aforesaid steps of said trellis work, and in the course of his play, reached the upper part of said trellis work where he came in contact with the aforesaid electric cable at a point where the same was not sufficiently, properly nor carefully insulated nor covered, nor protected, and received a deadly shock of electricity therefrom, causing the injuries hereinafter more particularly described, all of which was by reason of the negligence of defendant in placing and maintaining the trellis work and steps thereof as aforesaid, in failing to warn or prevent boys in the neighborhood as aforesaid, in permitting said cable to be without sufficient and proper insulation or protection as aforesaid, and in otherwise carelessly, recklessly and negligently maintaining and operating said bridge and electric wire, and without any negligence on the part of plaintiff's said son, his parents or guardians in anywise contributing thereto.

Fourteenth. That by reason of said accident, plaintiff's said son received great bodily injuries, and was made, still is and will continue to be sick, sore and disabled; sustaining other great, severe, lasting and painful internal and external injuries; on information and belief, that said injuries will be permanent in their nature and duration; plaintiff was compelled and will in the future be compelled to incur great expense for medical care, treatment and attendance for his said son, and in the purchase of drugs, medicines
6 and bandages wherewith to treat the injuries of his said son, and has lost and will continue to lose the services of his said son.

For a second cause of action:

Fifteenth. That on or about June 9th, 1916, plaintiff's son, David Fruchter, was an infant, aged seven years.

Sixteenth. That at all the times hereinafter mentioned, plaintiff was and still is entitled to the services of said David Fruchter, his son, who was and is a minor, under the age of twenty-one years, and who resided and still resides with plaintiff.

Seventeenth. On information and belief, that at all the times hereinafter mentioned, defendant was and still is a foreign corporation, organized and existing under and by virtue of the laws of the State of Connecticut.

Eighteenth. On information and belief, that at all the times hereinafter mentioned, and for many years prior thereto, defendant has continually been engaged in maintaining and operating as a common carrier of persons and freight, a railroad line through the State of Connecticut to and into the City of New York and in connection therewith and as a part of said system did build a certain bridge across and above its tracks at 149th Street, which is a public highway, in the Borough of Bronx, City of New York, and as a part of said bridge and railroad system and public highway, did incorporate
7 certain signal erections or structures, access to which was obtained from the ground by a flight of steps consisting of trellis work constructed from the ground to said signal erection or structure.

Nineteenth. On information and belief, that said bridge work and the steps in the said trellis work were so close together and the lowest one was at or so near the ground, that a child could easily walk or ascend from the ground to the top of said structure, by stepping from one rung in the trellis work to the other.

Twentieth. On information and belief, that the maintenance of the aforesaid steps in the trellis work in the aforesaid manner on said bridge was not usual or customary among companies engaged in business similar to that of defendant, and operating the same with due regard to the rights of the public.

Twenty-first. On information and belief, that at all the times hereinafter mentioned, said trellis work and the aforesaid steps thereon constituted an attraction to children, and in the usual course of events, were likely to tempt children to approach the same and children were naturally and instinctively drawn toward and climbed upon the same.

Twenty-second. On information and belief, that at all the times hereinafter mentioned, defendant did not warn boys in the neighborhood of said bridge against going upon the aforesaid trellis work or prevent their going upon the same.

Twenty-third. Upon information and belief, that at all the times
8 hereinafter mentioned, the boys in the immediate neighborhood surrounding said bridge, were in the habit of climbing upon the aforesaid trellis work and steps, of all of which defendant, its agents, servants and employes had, or in the exercise of reasonable care should have had due notice.

Twenty-fourth. On information and belief, that at all the times hereinafter mentioned defendant maintained a certain electric cable attached to and suspended in and about said bridge, at a point adjacent to or within a child's arm's length from the top of said trellis

work, which said cable was charged with a high, intense and deadly volume and current of electricity.

Twenty-fifth. On information and belief, that on or about the 9th day of June 1916, the aforesaid cable was not sufficiently, properly nor carefully insulated nor covered nor protected, and was therefore dangerous to the life and limb of anyone coming upon the aforesaid trellis work.

Twenty-sixth. That on or about the 9th day of June 1916, and for some time prior thereto plaintiff's said son resided with plaintiff at No. 630 Concord Avenue, Borough of Bronx, City of New York, which was in the immediate vicinity of the aforesaid bridge.

Twenty-seventh. On information and belief, that on or about the 9th day of June, 1916, plaintiff's said son, with other boys in the said neighborhood, was playing on said bridge at or near the aforesaid trellis work, and climbed upon the aforesaid steps of said trellis work, and in the course of his play, reached the upper part of said trellis work where he came in contact with the aforesaid electric cable at a point where the same was not sufficiently, properly nor carefully insulated nor covered, nor protected, and received a deadly shock of electricity therefrom, causing the injuries hereinafter more particularly described, all of which was by reason of the negligence of defendant in placing and maintaining the trellis work and steps thereof as aforesaid, in failing to warn or prevent boys in the neighborhood as aforesaid, in permitting said cable to be without sufficient and proper insulation or protection as aforesaid, and in that same constituted a nuisance, of all of which defendant, its agents, servants and employes had, or in the exercise of reasonable care should have had notice, and in otherwise carelessly, recklessly and negligently maintaining and operating said bridge and electric wire, and without any negligence on the part of plaintiff's said son, his parents or guardians in anywise contributing thereto.

9

Twenty-eighth. That by reason of said accident, plaintiff's said son received great bodily injuries, and was made, still is and will continue to be sick, sore and disabled; sustaining other great, severe, lasting and painful internal and external injuries; on information and belief, that said injuries will be permanent in their nature and duration; plaintiff was compelled and will in the future be compelled to incur great expense for medical care, treatment and attendance for his said son, and in the purchases of drugs, medicines and bandages wherewith to treat the injuries of his said son, and has lost and will continue to lose the services of his said son, all to his damage in the sum of Twenty Five Thousand ($25,000.00) Dollars.

10 Wherefore, plaintiff demands judgment against defendant for the sum of Twenty Five Thousand ($25,000.00) Dollars, together with the costs and disbursements of this action.

LEON SANDERS,
Attorney for Plaintiff.

Office & P. O. Address, 217 Broadway, Borough of Manhattan, City of New York.

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Sam Fruchter, being duly sworn, deposes and says that he is plaintiff in the within action; that he has heard read the foregoing amended complaint and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

his
SAM x FRUCHTER.
mark

Sworn to before me this 25 day of July, 1919.

HARRY A. COHEN,
Notary Public, New York County.

11 *Answer.*

United States District Court, Southern District of New York.

SAM FRUCHTER, Plaintiff,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

The defendant above named, by its attorney, John M. Gibbons, for its answer to the amended complaint herein.

To the first cause of action:

First. Denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs designated "First," "Second," "Tenth" and "Twelfth" of the first cause of action of the complaint herein.

Second. Denies, upon information and belief, each and every allegation contained in paragraphs designated "Fifth," "Sixth," "Seventh," "Eighth," "Ninth," "Eleventh," "Thirteenth" and "Fourteenth" of the first cause of action of the complaint herein.

To the second cause of action:

First. Denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations con-
12 tained in paragraphs designated "Fifteenth," "Sixteenth," "Nineteenth," "Twenty-fourth" and "Twenty-sixth" of the second cause of action of the complaint herein.

Second. Denies, upon information and belief, each and every allegation contained in paragraphs designated "Twentieth," "Twenty-first," "Twenty-second," "Twenty-third," "Twenty-fifth," "Twenty-seventh" and "Twenty-eighth" of the second cause of action of the complaint herein.

For a separate answer and defense, the defendant alleges, upon information and belief:

First. That whatever injuries the plaintiff's son, David Fruchter, may have received at the time and place mentioned in the complaint herein were due to his own negligence or carelessness, or to the negligence or carelessness of a third person or persons, to wit, the plaintiff plaintiff herein, and the parents or legal guardian of the said David Fruchter, over whom the defendant had no control, and not to the carelessness of the defendant, its agents or servants.

For a second separate answer and defense, the defendant alleges, upon information and belief:

First. That whatever injuries the plaintiff's son David Fruchter, may have received at the time and place mentioned in the complaint resulted from the failure of the said David Fruchter to exercise due care and diligence, his own negligence and carelessness contributing thereto.

13 Wherefore, the defendant demands judgment dismissing the complaint herein, with costs.

JOHN M. GIBBONS,
Attorney for Defendant.

Office and Postoffice Address, Room 3840, Grand Central Terminal, New York City.

STATE OF NEW YORK,
City and County of New York, ss:

Frank E. Hall being duly sworn, deposes and says: That he is the Treasurer's Agent of the New York, New Haven and Hartford Railroad Company, the defendant herein; that he has read the foregoing answer and knows the contents thereof and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true. That the said defendant is a corporation of the State of Connecticut and deponent is an agent thereof; that

the source of deponent's knowledge and the grounds of his belief as to all matters therein not stated to be upon knowledge are statements and reports received from the officers and agents of the said defendant having in charge the investigation of the matters set forth in the complaint.

FRANK E. HALL.

Sworn to before me this 12th day of September, 1919.

[SEAL.] FREDERICK W. MUELLER,
Notary Public, Kings County, No. 199.

Certificate filed in New York County No. 29.
Term expires March 30, 1921.

14 *Extract from Clerk's Minutes.*

At a Stated Term of the District Court of the United States for the Southern District of New York Held at the United States Court Rooms, in the U. S. Court House and Post Office Building, in the Borough of Manhattan, City of New York, on the 16th Day of August, in the Year of Our Lord One Thousand Nine Hundred and Twenty.

Present: Honorable William B. Sheppard, District Judge.

L. 20-272.

SAM FRUCHTER

vs.

THE N. Y., N. H. & H. R. R. Co.

Now comes the plaintiff by Leon Sanders, his attorney, and George W. Curtis, Jr. of Counsel, and moves the trial of this cause. Likewise comes the defendant by John M. Gibbons, their attorney, by James W. Carpenter of counsel. Thereupon a jury is duly impaneled and sworn and the cause proceeds to trial. After hearing the evidence of respective parties, the arguments of counsel, and the charge of the Court, the jury on Thursday, August 19th, 1920, retire in charge of an officer duly qualified to attend them and upon their return say they find a verdict for the plaintiff in the sum of $1,000.00.

Motion to set aside verdict denied. Exception.
Execution stayed ten days after entry of judgment.

An extract from the minutes.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk.

15 *Judgment.*

United States District Court, Southern District of New York.

SAM FRUCHTER, Plaintiff,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

The above entitled action having been brought in the Supreme Court of the State of New York, and having been thereafter removed by defendant to this Court, and the issues in the above entitled action having thereafter been duly brought on for trial before Hon. William B. Sheppard, District Judge of the United States, at the Federal Building, and a jury, and the jury having duly rendered a verdict in favor of plaintiff and against defendant for the sum of $1,000.00, and plaintiff's costs and disbursements having been duly taxed herein at the sum of $38.21.

Now on motion of Leon Sanders, Esq., attorney for plaintiff, it is

Adjudged that plaintiff, Sam Fruchter, recover of defendant, The New York New Haven, and Hartford Railroad Company, the sum of $1.000.00, together with $38.21, costs as taxed, making in all the sum of $1,038.21, and that plaintiff have execution therefor.

Dated, New York, August 24th, 1920.

ALEX. GILCHRIST, JR.,
Clerk.

16 *Order Denying Motion for New Trial.*

At a Stated Term of the District Court of the United States for the Southern District of New York Held at the United States Court Rooms on the 14th Day of September, 1920.

Present: Hon. William B. Sheppard, District Judge.

SAM FRUCHTER, Plaintiff,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

The issues in this action having come on regularly for trial before Hon. William B. Sheppard and a jury, at a Term of this Court, on the 16th, 17th, 18th and 19th days of August, 1920, and the same having been duly tried, and the jury having rendered a verdict in favor of the plaintiff and against the defendant in the sum of One Thousand Dollars ($1,000), and James W. Carpenter, of counsel for the defendant, having thereupon at that time and before the Judge

presiding at the trial, upon the Judge's minutes and upon the exceptions taken at the trial, moved to set aside the verdict of the jury upon the ground that the same was contrary to the evidence and contrary to the law.

Now, after hearing counsel for the defendant, in support of said motion to set aside the verdict herein and for a new trial,
17 and after hearing counsel for the plaintiff, in opposition thereto, and upon the minutes herein and the exceptions therein, and all the other papers and proceedings herein, and upon motion of John M. Gibbons, Esq., attorney for the defendant, it is

Ordered that the said motion be, and the same hereby is, in all respects denied.

WM. B. SHEPPARD,
U. S. D. J.

Order Staying Proceedings.

At a Stated Term of the United States District Court for the Southern District of New York Held at the United States Court House, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 14th Day of September, 1920.

Present: Hon. Martin T. Manton, U. S. Circuit Judge.

SAM FRUCHTER, Plaintiff,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

A judgment for the sum of One Thousand and Thirty-eight and 21/100 Dollars ($1,038.21) in favor of the plaintiff and
18 against the defendant having been entered in the office of the Clerk of the Court on the 24th day of August, 1920, and a Writ of Error having been sued out to reverse said judgment, it is

Now, on motion of John M. Gibbons, attorney for said defendant.

Ordered that execution and all proceedings in this suit be stayed pending the hearing and determination of the said Writ of Error and the coming down to this Court of the mandate of the United States Circuit Court of Appeals for the Second Circuit upon the filing by the defendant of a costs and supersedeas bond for One Thousand Five Hundred Dollars ($1,500), approved by a Judge of this Court.

M. MANTON,
U. S. Circuit Judge.

19 *Petition for Writ of Error.*

District Court of the United States, Southern District of New York.

SAM FRUCHTER, Plaintiff,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

To the District Court of the United States for the Southern District of New York:

The petition of The New York, New Haven and Hartford Railroad Company respectfully represents:

On *on* about the 24th day of August, 1920, judgment was entered in favor of Sam Frutcher v. The New York, New Haven and Hartford Railroad Company, to recover of the defendant the sum of One Thousand and Thirty-eight and 21/100 Dollars ($1,038.21), and costs, in which judgment and during the trial of the cause, certain errors were committed by the Trial Court.

Wherefore, The New York, New Haven and Hartford Railroad Company prays that a Writ of Error be allowed to the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, and that the record and a copy of the proceedings upon the trial of said cause be sent to said Court of Appeals for further proceedings and to correct that error which of right and according to the custom of the United States ought to be done.

20

JOHN M. GIBBONS,
Attorney for Defendant.

Office and P. O. Address, Room 3840, Grand Central Terminal, Borough of Manhattan, New York City.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you between Sam Fruchter, plaintiff, and The New York, New Haven and Hartford Railroad Company, defendant, a manifest error hath happened, to the great damage of the said defendant, as is said and appears by its complaint. We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, Do Com-

mand You, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceed-
21 ings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place before the Judges aforesaid, on the 14th day of October 1920, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 14th day of September, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States the one hundred and forty-fifth.

ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.
M. MANTON,
U. S. Circuit Judge.

22 *Appeal Bond.*

Hartford Accident and Indemnity Company,

Hartford, Connecticut.

Bond No. 155,630.

United States District Court, Southern District of New York.

SAM FRUCHTER, Plaintiff,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

Know all men by these presents, That we, The New York, New Haven & Hartford Railroad Company, as Principal, and the Hartford Accident and Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut, with an office at No. 84 William Street, New York, N. Y., as Surety, are held and firmly bound unto the above named Sam Fruchter in the sum of One Thousand Five and 00/100 ($1,500), Dollars, to be paid to the said Sam Fruchter for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, representatives, succes-

sors and assigns, jointly and severally, firmly by these presents.
23 Sealed with our seals and dated the 11th day of September, 1920.

Whereas, the above named The New York, New Haven & Hartford Railroad Company has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the judgment dated the 24th day of August, 1920, rendered in the above entitled suit, in the District Court of the United States for the Southern District of New York, for One Thousand thirty-eight and 21/100 ($1,038.21) Dollars.

Now, therefore, the condition of this obligation is such, that if the above named The New York, New Haven & Hartford Railroad Company shall prosecute an appeal to effect, and answer all damages and costs if it fail to make its appeal good, then this obligation shall be void, otherwise, the same shall be and remain in full force and virtue.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.
[SEAL.] A. E. CLARK,
Secretary.
HARTFORD ACCIDENT & INDEMNITY CO.,
By F. J. MENIG,
Resident Vice-President.

Attest:
WM. J. McINTYRE,
Resident Asst. Secretary.

STATE OF CONNECTICUT,
City and County of New Haven, ss:

On this 30th day of September, 1920, before me personally came A. E. Clark, with whom I am personally acquainted, who, be-
24 ing by me duly sworn, says that he resides in Wallingford, Conn., County of New Haven, State of Connecticut; that he is the Secretary of said Company and knows the corporate seal thereof; that the said seal affixed to the annexed bond is such corporate seal; that it was so affixed by order of the Board of Directors of said Company, and that he signed said instrument as Secretary of said Company by like authority.

WM. H. ROWLAND,
Notary Public.

STATE OF CONNECTICUT,
County of New Haven, ss:

I, Alfred N. Wheeler, Clerk of the Superior Court, the same being a court of record within and for said County and State, and the officer authorized by the laws of the State of Connecticut to make the following certificate of the County of New Haven, do hereby certify.

That William H. Rowland Esquire, whose name is subscribed to the annexed instrument, and thereon written and before whom

the annexed acknowledgment, oath or affidavit was taken, was at the time of taking such acknowledgment, oath, or affidavit a Notary Public in and for said County of New Haven, residing in said County, duly authorized to take the same, and the officer duly authrorized by the laws of said State to take and certify the acknowledgment and proof of deed to be recorded in said State and further, that I am well acquainted with the handwriting of such officer, and verily believe that the signature to such acknowledgment, jurat or certificate is genuine.

25 In testimony whereof, I hereunto set my hand and affix the seal of said Court, at New Haven, this 13th day of September A. D. 1920.

[SEAL.] ALFRED N. WHEELER,
[SEAL.] *Clerk.*

STATE OF NEW YORK,
County of New York, ss:

On September 11, 1920, before me personally came F. J. Menig, to me known, who, being duly sworn, did depose and say, that he resides in the City of New York; that he is the Resident Vice-President of the Hartford Accident and Indemnity Company, the corporation described in and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and the said F. J. Menig further said that he is acquainted with W. J. McIntyre and knows him to be the Resident Assistant Secretary of said company; that the signature of the said W. J. McIntyre subscribed to the within instrument is in the genuine handwriting of the said W. J. McIntyre and was subscribed thereto by him by like order of the Board of Directors and in the presence of him, the said F. J. Menig; and that the Superintendent of Insurance of the State of New York has, pursuant to chapter 33 of the Laws of the State of New York for the year
26 1909, constituting chapter 28 of the Consolidated Laws of the State of New York as amended by chapter 182 of the Laws of the State of New York for the year 1913, issued to the Hartford Accident and Indemnity Company his certificate that said company is qualified to become and be accepted as surety or guarantor on all bonds, undertakings and other obligations or guarantees, as provided in the Insurance law of the State of New York and all laws amendatory thereof and supplementary thereto; and that such certificate has not been revoked.

A. A. DUKE,
Notary Public, New York County.

New York County No. 293.
New York Register No. 1314.
Commission expires 1921.

At a regular and lawful meeting of the Board of Directors of the Hartford Accident and Indemnity Company, at which a quorum was present, held at the office of the company, in the City of Hartford, State of Connecticut, on the 2d day of March, A. D., 1920, on motion, it was unanimously

Resolved, that Paul Rutherford, or V. A. Cellen, or F. J. Menig, Resident Vice Presidents of the company in the State of New York be, and each of them is, hereby authorized and empowered to execute and deliver, and to attach the seal of the company to any and all bonds and undertakings on behalf of the company in its business of guaranteeing the fidelity of persons holding places of public or private trust; guaranteeing the performance of contracts
27 other than insurance policies; guaranteeing the performance of insurance contracts where surety bonds are accepted by states or municipalities; executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law allowed; and indemnifying banks, bankers, brokers, financial or moneyed associations, or financial or moneyed corporations against the loss of any bills of exchange, notes, drafts, acceptances of drafts, bonds, securities, evidence of debts, deeds mortgages, documents, currency and money, except that no such contract or indemnity indemnifying banks, bankers, brokers, financial or moneyed associations, or financial or moneyed corporations shall indemnify against loss caused by marine risks, or risks of transportation, or navigation; such bonds and undertakings, however, to be attested in every instance by one other of said Resident Vice-Presidents, or by W. J. Witschen, A. A. Duke, W. A. Earl, W. J. McIntyre, or W. J. McCarthy, Resident Assistant Secretaries of the company, as occasion may require.

STATE OF NEW YORK,
County of New York, ss:

I, W. J. McIntyre, Resident Asst. Secretary of the Hartford Accident and Indemnity Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and Do Hereby Certify that the same is a true and correct transcript therefrom, and of the whole of the said resolution, and that the same is still in full force and effect.

28 Given under my hand and the seal of the company, at the City of New York, on September 11, 1920.

W. J. McINTYRE,
Resident Ass. Secretary.

Hartford Accident and Indemnity Company,

Hartford, Connecticut.

Financial Statement, December 31, 1919.

Market Value.

Assets.

Government Bonds	$3,276,246.00
State, County and Municipal Bonds	1,061,030.00
Railroad Bonds	1,215,710.00
Miscellaneous Bonds	509,490.00
Loans on Mortgage (first lien)	190,000.00
	$6,252,476.00
Cash in Offices and Banks	1,170,105.08
Premiums in course of collection	1,788,444.28
Interest Accrued	77,000.17
Sundry Assets	209,312.65
Total Assets	$9,479,338.18

Liabilities.

Reserve for Claims and Suits		$3,400,028.77
Reserve for Unearned Premiums		3,296,978.58
29 Reserve for Commissions		379,645.65
Reserve for Premiums, over 90 days		57,304.60
Reserve for Taxes		173,878.00
Reserve for Sundry Bills, etc.,		22,884.25
Reserve for Bills Receivable, etc.		46,557.48
		$7,377,277.33
Capital paid in	$1,000,000.00	
Net Surplus over all Liabilities	1,120,060.85	
		2,120,060.85
		$9,497,338.18

Surplus to Policyholders, $2,120,060.85.

STATE OF NEW YORK,
County of New York, ss:

I, W. J. McIntyre, Resident Assistant Secretary of the Hartford Accident and Indemnity Company, do hereby certify that the foregoing is a correct statement of the financial condition of said Company, as of December 31, 1919, to the best of my knowledge and belief, and that the financial condition of said Company is as favorable now as it was when said statement was made.

W. J. McINTYRE,
Resident Asst. Secretary.

Subscribed and sworn to before me on September 11, 1920.

A. A. DUKE,
Notary Public, New York County.

New York County No. 293.
New York Register No. 1391.

Commission expires 1921.

30 *Citation.*

By the Honorable Martin T. Manton, U. S. Circuit Judge for the Second Circuit, to Sam Frutcher, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 14th day of October 1920, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein The New York, New Haven and Hartford Railroad Company is plaintiff-in-error, and you are defendant-in-error, to show cause, if any *they* be, why the judgment in said Writ of Error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 14th day of September, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States the one hundred and forty-fifth.

M. MANTON,
U. S. Circuit Judge, Second Circuit.

31 *Assignment of Errors.*

United States District Court, Southern District of New York.

SAM FRUCHTER, Plaintiff,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

On this 14th day of September, 1920, came the above named defendant, by its attorney, and shows that the judgment entered herein on the 24th day of August, 1920, in favor of the plaintiff and defendant for One thousand and thirty-eight and 21/100 dollars ($1,038.21) is erroneous for the following reasons:

First. The Learned Court erred in denying defendant's motion for a non-suit made at the close of plaintiff's case, and for a directed verdict in its favor made at the close of the entire case, for the following reasons:

(1) The action was commenced and the trial was had on the so-called attractive nuisance theory on account of an accident occurring within the State of New York, and the Learned Court failed to follow and apply the law of said State in respect thereto, as declared by the Court of Appeals of said State, and subsequently confirmed and followed by a long line of State decisions.

32 (2) The plaintiff's infant son was a trespasser, and defendant owed him no duty except to refrain from wilful and wanton negligence, of which there was no evidence.

(3) Even under the attractive nuisance theory of negligence, or any other, the plaintiff failed to prove the cause of action alleged, for the following reasons:

(*a*) The plaintiff's infant son testified without contradiction, that he was not invited, lured or enticed to his injury by the defendant, but that he deliberately and wilfully climbed up to the scene of the accident knowing that he had no right there and that he was doing wrong.

(*b*) There was nothing attractive or alluring about the bridge in question or the defendant's wire or the strut which supported it, and the plaintiff's infant son testified, without contradiction, that neither they nor any of them attracted, enticed or lured him to his injury.

(*c*) Plaintiff's infant son was attracted and lured to the top of the bridge by a bird's nest and to the wire in question, attached to the strut located on top of the bridge, by a bird, over neither of which the defendant had any control.

(*d*) Neither the top of the bridge nor the wire in question was accessible, as defined in the attractive nuisance doctrine, nor was the plaintiff's infant son licensed to be there, expressly or impliedly.

(*e*) Defendant was not obliged to anticipate and provide
33 for the contingency of the plaintiff's infant son or other children climbing to the top of this bridge belonging to the City of New York, and from there to the defendant's wire suspended approximately seven feet above it, the only access to which was via a standard steel strut, attached to the top of said bridge.

(*f*) Defendant was not required under Section 93 of the Railroad Law, or otherwise, to maintain guards, material or human so as to present the plaintiff's infant son or other children from climbing to the top of this bridge belonging to the City of New York.

(*g*) Defendant was not required to maintain guards, material or human so as to prevent, or to post warning signs so as to warn, plaintiff's infant son or other children from climbing up this strut and coming in contact with the wire in question.

(*h*) Defendant was not negligent in failing to install the device described by the plaintiff's engineer, for it was both inconvenient and impracticable.

(*i*) In maintaining the wire in question bare and uninsulated, except as against its supporting strut, under these circumstances defendant complied with the standards of practice prevailing under like conditions, and there was no proof to the contrary.

(*j*) The acts and omissions charged against the defendant were not the sole proximate cause of the accident.

(*k*) There was no evidence of negligence in defendant's construction of the bridge.

34 (*l*) In maintaining warning signs on the bridge and the struts and in assigning men to chase boys off the bridge, defendant more than fulfilled its obligation to the plaintiff's infant son and other children.

Second. The Learned Court erred in declining to charge, without qualification, as follows:

(1) Defendant was not obligated to use more than standard care established by the practice prevailing among companies operating such wires under similar circumstances.

(2) If the plaintiff's infant son knew he had no right there, he was a trespasser, and defendant owed him no active duty, and he cannot recover.

Third. The Learned Court erred in charging as follows:

(1) "They (meaning the defendant) are not insurers of the public against them, and the only liability that can be placed on the company in this case is whether or not, under the circumstances as the case has developed, whether the notice that they had received of the use of the bridge was sufficient to give them an opportunity to change the system, so as to prevent any injury that might take place, and if they did not do it, and if you are satisfied that it was negligence, in that they did not do it, and that the boy's injury was due to that carelessness on the part of the defendant, then plaintiff has made out a case by the preponderance of the evidence, and in that case, your verdict should be for the plaintiff."

35 (2) "Yes, gentlemen, the Court charges you, and I think I did charge you, that the defendant company is not required to adopt any different or other methods of installation of its wires than that commonly used by other companies that may use wires in that connection, and in that method of support, but you are to take into consideration in that connection, whether other companies, if informed of any practices that might have subjected children of this age to danger, then whether or not it would have been the duty of any such company to have adopted means preventive of the danger that was inherent in the superstructure."

(3) "If the boy was conscious, and realized that he was doing wrong, and was doing a thing that was forbidden, and was capable of appreciating the consequences of what he was up to, then he would be contributing to his injury, and in that case you should find for the defendant."

Fourth. The Learned Court erred in permitting the plaintiff's electrical expert to testify that the construction and maintenance of the defendant's wires under the circumstances presented in the question put to him were unsafe, as appears from the following:

"Q. Now, assume that this was a public bridge, and part of a highway at East 149th Street, New York City, and assume that it was used by children as well as by adults, and assume that within 300 feet of this bridge, was a large tenement district, which houses a great many people and assume that it was possible, and not
36 only possible, but the fact was that children did climb up around the structure of this bridge. Can you give us an expert opinion as to whether or not this construction of these wires, and this maintenance of these wires was safe?

Mr. Carpenter: I object to that question as incompetent and immaterial. He is asking whether he can give an expert opinion.

The Court: He is qualified as an expert, in electrical uses, and in electrical operation of these wires. This is his opinion, and that is all he is asked for. It is not binding, of course, on the jury. Answer the question.

Mr. Carpenter: Exception."

* * * * * * *

"Mr. Carpenter: Your Honor leaves in his opinion that in his opinion it was not safe?

The Court: Yes.

Mr. Carpenter: I move to strike it out, on the ground that it does not appear that he is basing that opinion as formed from his experience with companies using that type of structure, and I object to it as incompetent, irrelevant and immaterial.

The Court: Motion denied.

Mr. Carpenter: Exception."

Fifth. The Learned Court erred in declining to permit the defendant to cross-examine the plaintiff's electrical expert as to the prevailing practice in respect to the maintenance of electrical
37 wires under these circumstances, as appears from the following:

"Q. Have you made any investigation, I said, personal investigation, using your own eyesight and observation, of the prevailing practice?

A. In so far as possible, yes.

Q. Have you ever investigated the practice prevailing on the Norfolk & Western?

Mr. Curtis: That is objected to as incompetent, irrelevant and immaterial.

The Court: He has not said he knew anything about practice. he said he would consider, from his knowledge of electrical wires, and of this power, and from his observation of these particular ones, he said it was not safe to leave them in that particular condition. He never testified he had examined and inspected and gone around over these different railroad systems, and seen their operations and all that sort of thing.

Mr. Carpenter: Does your Honor maintain therefore that on behalf of this client, I cannot test his credibility and see, by finding out, what he knows of the practice among these companies that I cannot ask him how they maintain these wires under such circumstances?

The Court: No. He has not qualified for that.

Mr. Carpenter: I take an exception to your Honor's refusal to permit me to cross-examine him."

* * * * * * *

38 "Q. When you said that this condition as you saw it there was unsafe in your opinion, in what respect was it unsafe, and to whom was it unsafe?

A. In my opinion it was unsafe, because children finding this bridge, might easily come in contact with its wires, and it was unsafe in this way, that it was my opinion, when I inspected it, that it was easily possible to get rid of this danger, by a very simple device from the structure underneath the wires. To that extent I call it unsafe. Apparently, the precautions were not taken which could have been taken.

Q. Can you name a company which has those wires which has taken those precautions?

Mr. Curtis: I object to it, your Honor, as cross-examining on a subject he brought out himself.

The Court: Objection sustained. That is the answer to your own question, whether or not it could have been made safe.

Mr. Carpenter: I am asking him whether he could name any company which has those wires, which has taken those precautions.

The Court: That is going right back to the question. Objection sustained.

Mr. Carpenter: Exception.

Q. This structure which you have in mind, is what type of structure? What is it made out of?

A. The structure I have in mind would be an iron lattice work, built underneath the wires, above the top part of the bridge,
39 so that any boy getting on the top of the bridge, could not even though he tried, touch these wires. It would be simply an iron mesh, such as is used in banks and for other purposes, to protect for other purposes.

Q. Now, referring to Plaintiff's Exhibit No. 1, in your opinion, to make this place safe, you would have to, underneath these wires,

you would construct a lattice work, completely covering the space underneath these wires? Is that what you mean?

A. I would construct a lattice work covering the place underneath the wires to such an extent that a boy standing on the top girder of the bridge, could not touch the wires. That is, for a distance perhaps of two feet on either side of the girders of the bridge, so that the whole structure, underneath these wires, would be perhaps six feet long, along the wires.

Q. Extending out three feet from either side of the uprights which hold the wires?

A. Extending out three feet from either side of the top girder, on which the boy might be standing.

Q. It would be above his head?

A. Yes, it would be above his head.

Q. The lattice work would be above his head as he stands on top of the girder?

A. Yes, sir.

Q. And it would be out from the uprights, which hold these wires, three feet on either side?

A. Yes, sir.

Q. And underneath these wires?

A. Yes.

Q. And if that had been done, you would consider this place safe?

A. Then, in my opinion, the installation would have been safe.

Q. Have you borne in mind the distance that those wires were above that bridge?

A. I have.

Q. Above the top of the bridge?

A. Yes.

Q. How high were they?

A. Approximately six feet.

Q. Do you tell this Court and jury that a boy, six or seven years old, could reach six feet up, and touch this wire when standing on the girders?

A. I did not.

Q. So, if he was on top of the bridge, he would not come into the zone of danger, until he climbed the structure?

A. It would depend on how big the boy was.

Q. Assuming the average boy, seven years old. Stand up. The Fruchter boy will please stand up. All right. Never mind. The average boy, seven years old.

A. The average boy seven years old could not reach six feet above his head, I presume.

Q. You concede that, don't you?

Mr. Curtis: Of course, we concede it."

* * * * * * *

"Q. Can you name any company that has any such practice as that in use?

Mr. Curtis: I object to it.
The Court: Why do you want to repeat that? I sustain the objection.
Mr. Carpenter: Exception. That is all.

41 Sixth. The Learned Court erred in declining to permit the defendant to prove that considering the function of the wire in question, the protective device recommended by plaintiff's electrical expert was impracticable, as appears from the following:

"Q. Now, can you tell from the standpoint of function, bearing in mind the function which these wires perform, whether it was practicable to have such a device?

Mr. Curtis: I object to that.
The Court: I exclude that question.
Mr. Carpenter: May I have an exception?
The Court: Yes.

Seventh. The Learned Court erred in declining to permit the defendant to introduce in evidence its contract with the City of New York, showing its limited proprietary interests, if any, in the bridge in question, and that its contractual obligation in respect to the maintenance of the bridge superstructure was no greater than that imposed by Section 93 of the Railroad Law of New York, as appears from the following:

"Mr. Carpenter: I am embarrassed to know what the situation of the proof is, and I ask your Honor to permit me to subpœna the original contract between the City of New York and the New Haven Railroad Company, for the purpose of showing the proprietary interest of the New Haven Railroad Company in that bridge.

42 Mr. Curtis: And that would not be pertinent anyway, because they cannot bind us.

The Court: I will refuse the application at this time, because I do not think, with the admissions that were made by plaintiff's counsel in Court, I think that such contract is immaterial, it being admitted that the public had the use and ingress and egress over the street part of this bridge.
Mr. Curtis: Your Honor is correct, as a matter of law.
Mr. Carpenter: May I have an exception to your Honor's ruling?
The Court: Yes."

Eighth. The Learned Court erred in making exceedingly harmful and prejudicial comments in the presence of the jury upon the defendant's attempt to lay the foundation in cross-examining the plaintiff's infant son for the introduction of statements made by the plaintiff's infant son about three weeks after the accident contradicting his testimony in Court, and in limiting the defendant's cross-examination of the plaintiff's infant son on the question of his credibility; and the Learned Court also erred in declining defendant's motion to withdraw a juror, as appears from the following:

"Q. And when you were in the hospital did you make any statement to anybody from the railroad company about how this accident occurred?

A. No, sir."

Q. When I say a statement, David, I mean did you talk with anybody there about how the accident happened, or how you got hurt?

A. No, sir."

* * * * * * *

43 "Q. Do you remember seeing Mr. Hildrich at all?

A. No, sir."

* * * * * * *

"Q. Don't you ever remember Dr. Flynn, who was the same doctor who was there by you, and this gentleman was there, that I have had just stand up, and that you talked with them about this accident? Don't you remember it?

A. No, sir."

* * * * * * *

"Q. Do you remember seeing him (indicating Mr. Mulcox) there in the hospital, when he was taking some notes down of what you said?

Mr. Curtis: I object to that as to form.

The Court: Objection sustained.

Mr. Carpenter: Exception.

The Court: Will you undertake to offer in this case anything that this child said under such an examination as that, and would you undertake to offer something which is written, made by them, when the law does not recognize that what they did they are bound by?

Mr. Carpenter: Simply to show the boy's recollection at a time when it was fresher than it is now.

The Court: Didn't the surgeon testify yesterday that he was under the influence of opiates for two months?

Mr. Carpenter: I submit, if your Honor please, that at the time the statement was taken, if his recollection was good, when he was describing what he knew about the accident, that this is very immaterial.

44 The Court: It is for the jury to determine as to what the boy said under such circumstances, rather than the statement of men who wrote what he did say.

Mr. Carpenter: I must except to your Honor's remark. It seems to me, if your Honor would stop to consider——

The Court: I won't say, really, what I think about such an examination, but go on with your examination.

Mr. Carpenter: May I have an exception to your Honor's remark?

The Court: Yes. Take it. I understand that it is the law, throughout the United States, and as old as the common law itself, that an infant is not bound by his contracts, or even by what he

signs and seals. He has the right, within a reasonable time after he is 21 years of age, to refute the most solemn contract, and then, to undertake to bind the plaintiff, seven years old, in a statement he made about this thing.

Mr. Curtis: Your Honor will recall the questions at the time the doctor said he was under opiates for his pain.

The Court: You may ask what he said, and all that.

Mr. Carpenter: If your Honor please, I do not wish your Honor to misunderstand my position. I assumed that it was fundamental that I could, in showing the credibility of a witness, whether he was a boy or a man, that I could examine him on a statement that he made soon after the occurrence.

45 The Court: I simply suggested that if you are proposing to lay a predicate for the introduction of a statement made to some agent, or to some doctor, under the circumstances under which this boy may have made it in the hospital, it would not be admitted, and I say it here again.

Mr. Carpenter: I must respectfully except.

The Court: Go on and examine your witness, and see whether he is credible.

Mr. Carpenter: I must respectfully except, it seems to me, your Honor, that the remark in this very serious case, has been so prejudicial to the defendant, that I am really entitled to a withdrawal.

The Court: It is not intended, gentlemen of the jury, to prejudice you against the company, the defendant is this case at all, but I am simply suggesting to counsel what I think would be a proper ruling when such a document is presented, under circumstances as disclosed by the testimony, so far as adduced in this trial.

Mr. Curtis: Under the United States practice, as we all know, a Judge can say what he thinks about the evidence.

The Court: It does not control the minds of the jury. A Judge can comment upon the testimony in his charge, but the jury will be left free and untrammeled in their opinion as to what they are to believe.

Mr. Carpenter: I submit, if your Honor please, in view of what you have already stated, that it seems to me reflecting on my
46 own conduct, that it has been prejudicial to my client in this case, and I certainly never had any intention of doing anything which would be prejudicial. I have been attempting to try this case fairly, and for the best interests of the defendant in this case.

The Court: I have said nothing, except to indicate what the ruling of the Court would be upon an attempt to introduce a document contradicting the witness, and this seems to be a predicate for it.

Mr. Carpenter: But your Honor went outside of that, and prejudiced the weight of that evidence if it comes in later. I don't know what your Honor will rule, and I contend your Honor absolutely destroyed it, by the statement of the position your Honor has taken.

The Court: Not at all. When you get to that point, it is a matter

for the admission of such a document, and the Court will determine it.

Mr. Carpenter: May I have an exception to your Honor's ruling that I am not entitled to a withdrawal at this time?

The Court: Yes."

Ninth. The Learned Court erred in preventing the defendant from introducing in evidence the statement that plaintiff's infant son made in the hospital, showing that he appreciated the danger of coming in contact with a live wire, as appears from the following:

"Q. Do you remember this taking place, David? 'Q. What do you mean by a dead wire? A. It ain't a live wire. Q. What
47 is a live wire? A. It burns you.'

Q. Do you remember that taking place?

Mr. Curtis: We object.

The Witness: No, sir.

The Court: That has nothing about reading. I exclude that question and answer on the ground that the defendant exhausted his cross-examination when he had the witness after the direct-examination.

Mr. Carpenter: If your Honor please, I offer this for the purpose of showing that this boy knew from the signs on the bridge at the time of the accident, that there were signs posted there.

The Court: That question does not include anything about a sign on the bridge.

Mr. Carpenter: I know, but in my former questions to him, I showed that signs were discussed there.

The Court: There is nothing about his reading any signs.

Mr. Carpenter: Why, your Honor, I asked the question.

The Court: And I excluded the question. Take your exception.

Mr. Carpenter: I except."

Tenth. The Learned Court erred in making harmful and prejudicial comments when the defendant introduced in evidence the statements made by the plaintiff's infant son shortly after the accident, showing that in going into the superstructure of the bridge he knew he had no right there, as appears from the following:

48 "Q. Do you remember asking him (meaning plaintiff's infant son) this question—'Q. Did you know that you had no right?' and do you remember his making this answer 'A. No.' And then do you remember asking this question: 'Q. You knew that you should not go up there?' and do you remember his answering 'A. Yes, sir.' *Q.* Do you remember that?

A. I do, yes, sir.

Q. Do you remember this taking place—"Were you afraid when you went up there that the men would catch you? A. No, there was no man near me. Q. How do you know there was no man near you? A. I saw. Q. You looked? A. Yes.'

Mr. Curtis: I object to this. He must ask him the direct questions, and not question and answer. The rule is, did he say so and so, yes or no, did he make such and such a statement, yes or no.

Mr. Carpenter: I have a right to ask him these questions.

The Court: I do not quite get the point.

Mr. Curtis: I say that I object. That the rule is, in this State, to ask him, did he say so and so, and this witness must answer yes or no.

The Court: They may look upon it with the seriousness and solemnity of a deposition, but nobody else would.

Mr. Curtis: That is just why I object to it. That is just what he is trying to do now.

49 Mr. Carpenter: I object to that statement.

Mr. Curtis: I repeat it.

The Court: If counsel wants to use it let him go ahead.

Mr. Curtis: I do not object to him using it.

The Court: Just ask the witness what the interview was.

Mr. Carpenter: Do you mean he should state what the entire interview was?

The Court: No, not the particular subject.

Q. And did this take place? 'Q. And when you saw there was no man there, what did you do? A. Went up.'

Mr. Curtis: I object. Nobody knows better than Mr. Carpenter, that he must follow the rule of our practice.

The Court: What does it amount to in a case of this kind? I don't know what the Courts of this State hold, but if they hold that that was binding on the plaintiff, an inference, under the circumstances, it would not bind me. I do not care what the authority was in the State of New York.

Q. Did that take place?

A. It did.

Mr. Carpenter: Before putting this next question, I think I must except to your Honor's statement as just made, on the ground that it is unfair.

The Court: Very well.

Q. 'Q. And then when you saw there was no man there, what did you do? A. Went up. Q. You went up? A. Yes, sir,

50 there was a man working far away.' Did that take place?

A. It did."

* * * * * * *

"Q. Where was the boy when this conversation took place?

A. Lying in bed in the ward.

Q. Public or private?

A. Public.

Mr. Curtis: That is objected to as incompetent, irrelevant and immaterial.

The Court: What difference does it make?

Mr. Carpenter: I want to show this railroad treated the boy in a proper manner, and did not deal unfairly with him."

Eleventh. The Learned Court erred in making harmful and prejudicial comments when the defendant offered evidence to show that the protective device recommended by the plaintiff's electrical expert was impracticable in view of the multitude of struts along the defendant's right of way which were accessible to children and therefore would have to be protected if the opinion of the plaintiff's expert was sound, as appears from the following:

"Q. How many struts are there on this bridge, and of a nature similar to the one at 149th Street, how many struts are there on bridges on the New Haven Road, similar to the one you have described, to the best of your recollection?

A. Upward of 2,000.

Q. What is the length of the electrified line of the New York, New Haven & Hartford Railroad Company?

51 Mr. Curtis: That is objected to.

Q. Between the two terminals?

The Court: What is the purpose of this?

Mr. Carpenter: Why, to show that the method which their so-called expert testified to, is utterly impracticable.

Mr. Curtis: On account of the expense.

The Court: About this wire mesh?

Mr. Carpenter: Yes.

The Court: He said it was not practicable to do it that way. What more do you want. He is an expert, and there is a conflict between the two.

Mr. Carpenter: I submit that we ought to have before us, in weighing the credibility of his opinion, the physical situation on which it is based.

The Court: Where?

Mr. Carpenter: Along the line.

The Court: From here to Hartford or Boston?

Mr. Carpenter: Yes.

The Court: You might as well go into the cost of excavating over here at Westchester, on that line. It is just about as material. We are talking about the bridge. The only thing the Court and the jury are concerned about is the construction of this bridge, and the wires over that bridge, and whether they were up to the standard, and whether they are safe or not, and whether it was impracticable.

Mr. Carpenter: In the Supreme Court case, in the Stout case, the Court laid down the proposition that it was material.

52 The Court: Yes, I know. I read it. I read an opinion where the Courts all go into it, and even comment upon the fact, and go into the cost of the land, and how much money was paid for the land, and even the cost of each telephone pole, and all such

things, as if that had anything to do with whether or not there was carelessness.

Mr. Carpenter: Has your Honor seen that Supreme Court decision?

The Court: Of this State?

Mr. Carpenter: No, the United States. The Stout case.

The Court: Produce it. Your construction of it may be different from mine.

Mr. Carpenter: May we send for it?

The Court: Go on with your questions.

Mr. Carpenter: Very well.

Q. Can you state from your experience and knowledge of steel values and labor costs, whether from the standpoint of the cost alone, it would be practicable for this railroad to use the device which the plaintiff's expert described?

Mr. Curtis: That is objected to as incompetent, irrelevant and immaterial, and furthermore, that no question of safety is measured by dollars, and that furthermore——

The Court: I will overrule your objection.

Mr. Curtis: And further the Supreme Court does not agree with Mr. Carpenter, in spite of the assertion of counsel.

53 The Court: Objection overruled. If this witness can testify that it was impracticable to do that, because it would bankrupt the company, why then, he may draw his conclusion, and say so, but that is his opinion, and the jury is not bound by it. The jury can accept it, but they have opinions of their own, and are entitled to exercise their own common sense and judgment. These questions are not absolutely binding on anybody. It is merely for light and explanation, which experts are always called for in Court. You argue over something just as if it was a decree from Washington, from the Supreme Court, and an opinion written by the Chief Justice.

Q. His Honor says you may answer it.

The Court: I am surprised that juries are kept here to listen to these immaterial matters in question, and the Courts ought to take it in hand.

Mr. Carpenter: May I except to your Honor's remark as to its being immaterial?"

Twelfth. The Learned Court erred in permitting the plaintiff to ask the defendant's electrical expert whether it was possible to construct a wooden conduit about the wire in question, as appears from the following:

"Q. You could stretch a wooden conduit, a wooden construction, having a bottom and two sides to it, by attaching such construction at each end to the bonnet, and at intervals say of 8 or 10 feet,

54 below the uprights, from the top girders of the bridge, to support that wooden structure, could you not?

Mr. Carpenter: I object to the question as incompetent and immaterial, and especially upon the ground that he does not make any suggestion as to how it could be done.

The Court: Objection overruled. I understand the purpose of it. This witness was asked whether it was practical or not, and this cross-examination tends to show whether it is or isn't.

Mr. Carpenter: Exception. I object to the particular question on the ground that it is merely assuming that it could be done.

The Court: Objection overruled.

Mr. Carpenter: Exception. I object to it on the further ground that his own expert when on the stand, never suggested any such device, and they are bound by him, on their own theory of the case.

The Court: Objection overruled. I am not going to consume more time. This case ought to close.

Mr. Carpenter: Exception."

Thirteenth. The Learned Court erred in preventing the defendant from asking its electrical expert whether the trough like conduit suggested by the plaintiff's attorney for the protection of the wire had ever been adopted in practice under these circumstances, and if not, why it was not practicable, as appears from the following:

55 "Q. Do you know of any railroad in the country that has ever adopted a trough like structure, made of wood, and concrete, which was described by Mr Curtis in his hypothetical question? Do you know of any railroad that has ever adopted that practice?

A. I would like to know for what purpose.

Q. For protecting wires carried over a bridge similar to the situation at 149th Street?

A. I do not.

Q. And will you state why that would not be, in your opinion, practicable?

Mr. Curtis: I object to that, if your Honor please.

The Court: No, you need not go into that.

Mr. Carpenter: I except.

The Court: Yes.

Q. Do you know of any engineer or board of engineers that have ever made any such recommendation for such a device, under such circumstances?

Mr. Curtis: That is objected to.

The Court: I will exclude that.

Mr. Carpenter: Exception."

Fourteenth. The Learned Court erred in rejecting the defendant's offer as evidence of the stenographic minutes and typewritten statement made therefrom of the interview with the plaintiff in the hospital, as appears from the following:

"Q. I hand you this document, Mr. Mulcox (handing statement to the witness) and ask you if that is the typewritten state-
56 ment and also your notes?
A. Yes, sir.
Q. That you took that day?
A. Yes, sir.

Mr. Carpenter: I offer it in evidence.
Mr. Curtis: I object to it as entirely improper.
The Court: Objection sustained.
Mr. Carpenter: Exception. Can I have it marked for identification?
The Court: Yes.
Statement marked Defendant's Exhibit L for identification."

Fifteenth. The Learned Court erred in refusing to take judicial notice of the fact that the Appellate Division of the Supreme Court of the State of New York is the next highest Court to the Court of Appeals after the defendant had produced evidence that the stenographic notes of the statement of the plaintiff's infant son had been taken in the hospital by Mr. Mulcox, who, at the time of this trial was confidential clerk and stenographer of Judge Smith of the said Appellate Division, as appears from the following:

"Mr. Carpenter: I ask your Honor to take judicial notice and charge the jury that the Appellate Division of the Supreme Court of New York is the next highest Court to the Court of Appeals.
The Court: Yes, but they do not prescribe rules of procedure for Federal Courts.
Mr. Carpenter: No, but I merely ask your Honor to take judicial notice of that position.
57 The Court: This is not a document or evidence that was produced in Court, and therefore it is purely ex parte, to read the answers given there.
Mr. Carpenter: Exception. That is all."

Sixteenth. The Learned Court erred in making harmful and prejudicial comments when the defendant attempted to attack the credibility of the plaintiff's witness, William Goll, after he had testified that the defendant placed the warning signs on the bridge subsequent to the accident, and in limiting the defendant's cross-examination seeking to establish the incredibility of the witness, as appears from the following:

"Q. As an officer of the law, you made no report?
A. I made no report.
Q. That those signs were not there at the time of the accident?

Mr. Curtis: We object to it upon the ground that it assumes he was under some obligation to report with regard to signs, which is absolutely without foundation.
The Court: Unless there is some ordinance or some such rule.

Mr. Curtis: There is no such ordinance or rule.
The Witness: I never made a report.
The Court: Do not let us take so much time in going into these things.
Mr. Carpenter: Does your Honor mean that I am not conducting this examination properly?
The Court: No. I am just putting you on notice that
58 you should not go into reasons for something that is not required by law. You can take an exception if you desire.
Mr. Carpenter: Exception.

Q. Do I understand that at the time in question, that you felt that this railroad was at fault in not having these signs there?

Mr. Curtis: That is objected to.
The Court: Objection sustained. I do not want any reasons or any argument from this witness.

Q. When did you first make this statement, which you have made here today, that there were no signs on this bridge, such as you have described, on the upper part of the bridge, stating that there were live wires there. When did you first make this statement?

The Court: Do you recollect? If you do not know, say you don't know.
The Witness: I don't know.

Q. Did you discuss it with anybody?
A. I did, yes.
Q. When?
A. Two weeks ago.
Q. That is the first time?
A. That is the first time.
Q. So from the time of the accident in 1916, down to date, until two weeks ago, you never discussed its feature, about the lack of those signs, is that right?
A. That is right.
Q. And as a police officer you saw many accidents, I suppose?
A. Yes, sir.
59 Q. And made many reports?
A. Yes, sir.
Q. And you have testified in many cases?
A. I did.

Mr. Curtis: I object to that.
The Court: Objection sustained.
Mr. Carpenter: Exception."

* * * * * * *

"Q. Why is it that you recall that date. Tell this Court and jury what event fixes that time in your mind, as being about the time that those signs were put there?
A. Because there was an accident occurred there, and every time

I passed that bridge, I thought of this bridge and thought of this accident, and I always looked to see if it was properly guarded against another accident of the same kind.

Q. Do you tell the Court and jury that another boy or some other accident occurred, and that another boy was burned on that bridge?

A. There was a boy, one time. The one boy. I did not say he was burned on that bridge, but there was a boy burned on the wires that went under the bridge.

Q. What accident are you referring to now, when you say that there was an accident that caused this to come to your mind?

A. I did not have the case. That is the reason I do not remember the particulars of the case, but I remember the time. A boy climbed over the railing, the guard railing, a little higher up, and he must have fallen on these wires.

60 The Court: Counsel asked you about signs that were put up on the top wires, and what caused you to look and remember about it. How did you come to note the fact that the sign was put up on the top wires? Not in those lower wires, because that refers to a collateral issue, and has nothing to do with this case.

The Witness: Seeing that this accident had occurred, of course I took particular notice to see if there were proper precautions taken so as there wouldn't be another accident of that kind.

The Court: You are speaking of the accident to the Fruchter boy?

The Witness: Yes, sir.

Q. You had nothing to do with this accident to the other boy, down under the bridge? You made no report of it, and had nothing to do with it?

Mr. Curtis: I object to it.

The Court: Objection sustained. We are not going into the trial of that case at this time.

Mr. Carpenter: I am not going into that, your Honor, and I take an exception.

Q. So I understand that that other accident, with that other boy, has nothing to do with this.

Q. Have you refreshed your recollection as to when these signs were put there for the first time?

A. No.

Q. It is not refreshed?

A. No.

61 Q. So that when you said a moment ago that the reason you knew it was about two weeks, because of an accident, which accident did you refer to?

Mr. Curtis: I object to that as already answered.

The Court: Objection sustained.

Mr. Carpenter: Exception.

The Court: I am going to see that this case is conducted with some expedition, or else we will know it.

Mr. Carpenter: Now, if your Honor please, I contend——

The Court: I do not see the necessity of going into all these collateral matters, unless it is to test the credibility of the witness.

Mr. Carpenter: We are trying to test his credibility on the question as to when——

The Court: Do it with pertinence, and with a proper question.

Mr. Carpenter: I submit, if the Court please, that that is not a proper criticism.

The Court: The Court is the proper one to submit it to. I will conduct the trial, and if other Judges would do the same thing, there would not be these cases going on here for four or five years, without getting to trial.

Mr. Carpenter: I must except to that, your Honor.

The Court: Very well.

Mr. Carpenter: I say it is not fair to my client or to myself, under these circumstances.

The Court: Very well. Take it down."

62 Seventeenth. The Learned Court erred in permitting the plaintiff's witness to testify to remarks made by laborers working in the vicinity of the bridge when boys were playing in the superstructure of it, as appears from the following:

"Q. Mr. Wohl, you were asked yesterday some questions with regard to seeing people in and around the railroad track at any time that you were on the bridge?

A. Yes, sir."

* * * * * * *

"Q. I understand that in describing the picture here yesterday, at the rail, to the jury, you stated that one of those men had said something that you heard?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Mr. Carpenter: I object to what Mr. Curtis understood.

Q. I will follow it up this way. Did any of those men at any time, that you say you saw under the bridge, did any of them at any time say anything that you heard while you were climbing up on the bridge?

Mr. Carpenter: I object, unless it is first shown that those men were employees of the New York, New Haven & Hartford Railroad Company, and were authorized.

The Court: That goes for what it may be worth. If they were men working around, shoveling dirt, and driving stakes, it depends on what they were doing. It may be an inference that they were employees.

Mr. Carpenter: Suppose somebody else was there, and made some remark, would it be binding?

63 The Court: No. He does not know, but the jury are entitled from the circumstances shown, to decide for themselves.

Mr. Carpenter: May I have an exception, your Honor?
The Court: Yes.

Q. Do you know what the Court says now?
A. Yes, sir.
Q. When did you ever hear any of the men that you saw working the tracks there, say at any time while you were up on the bridge—what did you ever hear them say?
A. 'Look at them damned kids on the bridge there.' They never chased us or nothing. They just said, 'Look at them damned kids.'"

Eighteenth. The Learned Court erred in denying the defendant's motion for a directed verdict, for the plaintiff was guilty of contributory negligence.

Wherefore, defendant prays that said judgment be vacated, set aside and a new trial granted to the defendant herein.

JOHN M. GIBBONS,
Attorney for Defendant.

Office and Post Office Address, Room 3840, Grand Central Terminal, New York City.

64 CASE OF DAVID FRUCHTER.

Summons.

Supreme Court, New York County.

DAVID FRUCHTER, an Infant, by JENNY FRUCHTER, His Guardian ad Litem, Plaintiff,

against

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's attorney within twenty (20) days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, January 11th, 1917.

LEON SANDERS,
Plaintiff's Attorney.

Office and Post Office Address, No. 217 Broadway, New York City.

65 *Complaint.*

United States District Court, Southern District of New York.

DAVID FRUCHTER, an Infant, by JENNY FRUCHTER, His Guardian ad Litem, Plaintiff,

against

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

Plaintiff, complaining of defendant, for his amended complaint, alleges:

For a First Cause of Action.

First. That on or about June 9th, 1916, plaintiff was an infant, aged seven years.

Second. That prior to the commencement of this action, by an order of this Court, heretofore duly made and entered herein, Jenny Fruchter was duly appointed guardian ad litem of the infant plaintiff herein for the purposes of this action.

Third. On information and belief, that at all the times hereinafter mentioned, defendant was and still is a foreign corporation, organized and existing under and by virtue of the laws of the State of Connecticut.

66 Fourth. On information and belief, that at all the times hereinafter mentioned, and for many years prior thereto, defendant has continuously been engaged in maintaning and operating as a common carrier of persons and freight, a railroad line through the State of Connecticut to and into the City of New York and in connection therewith and as a part of said system did build a certain bridge across and above its tracks at 149th Street, which is a public highway, in the Borough of Bronx, City of New York, and as a part of said bridge and railroad system and public highway, did incorporate certain signal erections or structures, access to which was obtained from the ground by a flight of steps consisting of trellis work constructed from the ground to said signal erection or structure.

Fifth. On information and belief, that said bridge work and the steps in the said trellis work were so close together and the lowest one was at or so near the ground, that a child could easily walk or ascend from the ground to the top of said structure, by stepping from one rung in the trellis work to the other.

Sixth. On information and belief, that the maintenance of the aforesaid steps in the trellis work in the aforesaid manner on said bridge was not usual or customary among companies engaged in business similar to that of defendant, and operating the same with due regard to the rights of the public.

Seventh. On information and belief, that at all the times hereinafter mentioned, said trellis work and the aforesaid steps
67 thereon constituted an attraction to children, and in the usual course of events, were likely to tempt children to approach the same and children were naturally and instinctively drawn toward and climbed upon the same.

Eighth. On information and belief, that at all times hereinafter mentioned, defendant did not warn boys in the neighborhood of said bridge against going upon the aforesaid trellis work, or prevent their going upon the same.

Ninth. Upon information and belief, that at all the times hereinafter mentioned, the boys in the immediate neighborhood surrounding said bridge, were in the habit of climbing upon the aforesaid trellis work and steps, of all of which defendants, its agents, servants and employees, had, or in the exercise of reasonable care should have had due notice.

Tenth. On information and belief, that at all the times hereinafter mentioned, defendant maintained a certain electric cable attached to and suspended in and about said bridge, at a point adjacent to or within a child's arm's length from the top of said trellis work, which said cable was charged with a high, intense and deadly volume and current of electricity.

Eleventh. On information and belief, that on or about the 9th day of June, 1916, the aforesaid cable was not sufficiently, properly nor carefully insulated nor covered nor protected, and was therefore dangerous to the life and limb of anyone coming upon the aforesaid trellis work.

68 Twelfth. That on or about the 9th day of June, 1916, and for some time prior thereto, plaintiff resided at No. 630 Concord Avenue, Borough of Bronx, City of New York, which was in the immediate vicinity of the aforesaid bridge.

Thirteenth. On information and belief, that on or about the 9th day of June, 1916, plaintiff, with other boys in the said neighborhood, was playing on said bridge at or near the aforesaid trellis work, and climbed upon the aforesaid steps of said trellis work, and in the course of his play, reached the upper part of said trellis work where he came in contact with the aforesaid electric cable at a point where the same was not sufficiently, properly nor carefully insulated nor covered, nor protected, and received a deadly shock of electricity therefrom, causing the injuries hereinafter more particularly described, all of which was by reason of the negligence of defendant in placing and maintaining the trellis work and steps thereof as aforesaid, in failing to warn or prevent boys in the neighborhood as aforesaid, in permitting said cable to be without sufficient and proper insulation or protection as aforesaid, and in otherwise carelessly, recklessly and negligently maintaining and operating said bridge and electric wire, and without any negligence on the part of plaintiff, his parents or guardians in anywise contributing thereto.

Fourteenth. That by reason of said accident, plaintiff received great bodily injuries, and was made, still is and will continue to be sick, sore and disabled; sustaining other great, severe, lasting and painful internal and external injuries; on information and
69 belief, that said injuries will be permanent in their nature and duration.

For a Second Cause of Action.

Fifteenth. That on or about June 9th, 1916, plaintiff was an infant, aged seven years.

Sixteenth. That prior to the commencement of this action, by an order of this Court, heretofore duly made and entered herein, Jenny Fruchter was duly appointed guardian ad litem of the infant plaintiff herein for the purposes of this action.

Seventeenth. On information and belief, that at all the times hereinafter mentioned, defendant was and still is a foreign corporation, organized and existing under and by virtue of the laws of the State of Connecticut.

Eighteenth. On information and belief, that at all the times hereinafter mentioned, and for many years prior thereto, defendant has continuously been engaged in maintaining and operating as a common carrier of persons and freight, a railroad line through the State of Connecticut to and into the City of New York and in connection therewith and as a part of said system did build a certain bridge across and above its tracks at 149th Street, which is a public highway, in the Borough of Bronx, City of New York, and as a part of said bridge and railroad system and public highway, did incorporate certain signal erections or structures, access to which was obtained from the ground by a flight of steps consisting of trellis work constructed from the ground to said signal erection or structure.

70 Nineteenth. On information and belief, that said bridge work and the steps in the said trellis work were so close together and the lowest one was at or so near the ground, that a child could easily walk or ascend from the ground to the top of said structure, by stepping from one rung in the trellis work to the other.

Twentieth. On information and belief, that the maintenance of the aforesaid steps in the trellis work in the aforesaid manner on said bridge was not usual or customary among companies engaged in business similar to that of defendant, and operating the same with due regard to the rights of the public.

Twenty-first. On information and belief, that at all the times hereinafter mentioned, said trellis work and the aforesaid steps thereon constituted an attraction to children, and in the usual course of events, were likely to tempt children to approach the same and children were naturally and instinctively drawn toward and climbed upon the same.

Twenty-second. On information and belief, that at all the times hereinafter mentioned, defendant did not warn boys in the neighborhood of said bridge against going upon the aforesaid trellis work, or prevent their going upon the same.

Twenty-third. Upon information and belief, that at all the times hereinafter mentioned, the boys in the immediate neighborhood surrounding said bridge, were in the habit of climbing upon the aforesaid trellis work and steps, of all of which defendant, its
71 agents, servants and employees had, or in the exercise of reasonable care should have had due notice.

Twenty-fourth. On information and belief, that at all the times hereinafter mentioned, defendant maintained a certain electric cable attached to and suspended in and about said bridge, at a point adjacent to or within a child's arm's length from the top of said trellis work, which said cable was charged with a high, intense and deadly volume and current of electricity.

Twenty-fifth. On information and belief, that on or about the 9th day of June, 1916, the aforesaid cable was not sufficiently, properly nor carefully insulated nor covered nor protected, and was therefore dangerous to the life and limb of anyone coming upon the aforesaid trellis work.

Twenty-sixth. That on or about the 9th day of June, 1916, and for some time prior thereto, plaintiff resided at No. 630 Concord Avenue, Borough of Bronx, City of New York, which was in the immediate vicinity of the aforesaid bridge.

Twenty-seventh. On information and belief, that on or about the 9th day of June, 1916, plaintiff, with other boys in the said neighborhood, was playing on said bridge at or near the aforesaid trellis work, and climbed upon the aforesaid steps of said trellis work, and in the course of his play, reached the upper part of said trellis work where he came in contact with the aforesaid electric cable at a point where the same was not suffici-ntly, properly nor carefully insulated nor covered, nor protected, and received a deadly
72 shock of electricity therefrom, causing the injuries hereinafter more particularly described, all of which was by reason of the negligence of defendant in placing and maintaining the trellis work and steps thereof as aforesaid, in failing to warn or prevent boys in the neighborhood as aforesaid, in permitting said cable to be without sufficient and proper insulation or protection as aforesaid, and in that same constituted a nuisance, of all of which defendant, its agents, servants and employees had, or in the exercise of reasonable care should have had due notice, and in otherwise carelessly, recklessly and negligently maintaining and operating said bridge and electric wire, and without any negligence on the part of plaintiff, his parents or guardians in anywise contributing thereto.

Twenty-eighth. That by reason of said accident, plaintiff received great bodily injuries, and was made, still is and will continue to be sick, sore and disabled; sustaining other great, severe, lasting and

painful internal and external injuries; on information and belief, that said injuries will be permanent in their nature and duration, all to plaintiff's damage in the sum of Forty Thousand ($40,000.00) Dollars.

Wherefore, plaintiff demands judgment against defendant for the sum of Forty Thousand ($40,000.00) Dollars, together with the costs and disbursements of this action.

LEON SANDERS,
Attorney for Plaintiff.

Office & P. O. Address, 217 Broadway, Borough of Manhattan, City of New York.

73 STATE OF NEW YORK,
City of New York,
County of New York, ss:

Jenny Fruchter, being duly sworn, deposes and says that she is guardian ad litem of plaintiff in the within action; that she has read the foregoing amended complaint and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

JENNY FRUCHTER.

Sworn to before me this 25 day of July, 1919.

HARRY A. COHEN,
Notary Public, New York County.

74 *Answer.*

United States District Court, Southern District of New York.

DAVID FRUCHTER, an Infant, by JENNY FRUCHTER, His Guardian ad Litem, Plaintiff,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

The defendant above named, by its attorney, John M. Gibbons, for its answer to the amended complaint herein

To the first cause of action:

First. Denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs designated "First," "Second," "Tenth" and "Twelfth" of the first cause of action of the complaint herein.

Second. Denies, upon information and belief, each and every allegation contained in paragraphs designated "Fifth," "Sixth," "Seventh," "Eighth," "Ninth," "Eleventh," "Thirteenth" and "Fourteenth" of the first cause of action of the complaint herein.

75 To the second cause of action:

First. Denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs designated "Fifteenth," "Sixteenth," "Twenty-fourth" and "Twenty-sixth" of the second cause of action of the complaint herein.

Second. Denies, upon information and belief, each and every allegation contained in paragraphs designated "Nineteenth," "Twentieth," "Twenty-first," "Twenty-second," "Twenty-third," "Twenty-fifth," "Twenty-seventh" and "Twenty-eighth" of the second cause of action of the complaint herein.

For a separate answer and defense, the defendant alleges, upon information and belief:

First. That whatever injuries the infant plaintiff may have received at the time and place mentioned in the complaint resulted from his failure to exercise due care and diligence, his own negligence and carelessness contributing thereto.

For a second separate answer, upon information and belief:

First. That whatever injuries the infant plaintiff may have received at the time and place mentioned in the complaint herein were due to his own carelessness or negligence, or to the negligence or carelessness of a third person or persons over whom the defendant had no control, to wit, the parents or legal guardian of the said infant plaintiff, and not to the carelessness of the defendant, its agents or servants.

76 Wherefore, the defendant demands judgment dismissing the complaint herein, with costs.

JOHN M. GIBBONS,
Attorney for Defendant

Office and Post Office Address: Room 3840, Grand Central Terminal, New York City.

STATE OF NEW YORK,
City and County of New York, ss:

Frank E. Hall being duly sworn, deposes and says: That he is the Treasurer's Agent of the New York, New Haven and Hartford Railroad Company, the defendant herein; that he has read the foregoing answer and knows the contents thereof and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief and as to those matters

he believes it to be true. That the said defendant is a corporation of the State of Connecticut and deponent is an agent thereof; that the source of deponent's knowledge and the grounds of his belief as to all matters therein not stated to be upon knowledge are statements and reports received from the officers and agents of the said defendant having in charge the investigation of the matters set forth in the complaint. FRANK E. HALL.

Sworn to before me this 12th day of September, 1919.
FREDERICK W. MUELLER,
[SEAL.] *Notary Public.*

Notary Public, Kings County No. 199.
Certificate filed in New York County No. 29.
Term expires March 30, 1921.

77 *Notice of Motion to Amend Answer Dated August 7, 1920.*

United States District Court, Southern District of New York.

DAVID FRUCHTER, an Infant, by JENNIE FRUCHTER, His Guardian ad Litem, Plaintiff,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

SIR:

Please take notice that the defendant herein will move at the time of trial to amend its answer to the amended complaint by inserting in paragraph second of its answer to the First Cause of action after the word "Fourteenth" the following words: "and so much of paragraph fourth as alleges access to certain signal erections or structures was obtained from the ground by a flight of steps consisting of trellis work constructed from the ground to said signal erection or structure."

As to the Second Cause of Action, defendant will move at the time of trial to amend its answer to the amended complaint by inserting in paragraph second to the Second Cause of Action after the word "Twenty-eighth" the following words: "and so much
78 of paragraph eighteen as alleges access to certain signal erections or structures was obtained from the ground by a flight of steps consisting of trellis work constructed from the ground to said signal erection or structure."

Dated, New York, August 7th, 1920.

Yours, etc., JOHN M. GIBBONS,
Attorney for Defendant.

Office and Post Office Address: Room 3840, Grand Central Terminal, New York City.

To: Leon Sanders, Esq., Plaintiff's Attorney, 217 Broadway, New York City.

79 *Notice of Motion to Amend Answer Dated August* 12, 1920.

United States District Court, Southern District of New York.

DAVID FRUCHTER, an Infant, by JENNY FRUCHTER, His Guardian ad Litem, Plaintiff,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

SIR:

Please take notice that the defendant herein will move at the time of trial to amend its answer to the amended complaint by inserting in paragraph second of defendant's answer to the first cause of action, after the word "fourteenth," the words "and so much of paragraph four of the first cause of action of said amended complaint as alleges that the defendant as a part of said bridge and railroad system and public highway, did incorporate certain signal erections or structures, access to which was obtained from the ground by a flight of steps consisting of trellis work constructed from the ground to said signal erection or structure."

As to the Second Cause of Action, defendant will move at the time of trial to amend its answer to the amended complaint
80 by inserting in the second paragraph of defendant's answer to the second cause of action after the word "twenty-eighth" the words "and so much of paragraph eighteen of the Second Cause of Action of said amended complaint as alleges that the defendant as a part of said bridge and railroad system and public highway, did incorporate certain signal erections or structures, access to which was obtained from the ground by a flight of steps consisting of trellis work constructed from the ground to said signal erection or structure."

Dated, New York, August 12th, 1920.

JOHN M. GIBBONS,
Attorney for Defendant.

Office and Post Office Address: Room 3840, Grand Central Terminal, New York City.

To: Leon Sanders, Esq., Plaintiff's Attorney, 217 Broadway, New York City.

81 *Plaintiff's Bill of Particulars.*

United States District Court, Southern District of New York.

DAVID FRUCHTER, an Infant, by JENNY FRUCHTER, His Guardian ad Litem, Plaintiff,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

SIR:

Please take notice, that the following is a bill of particulars of plaintiff's claim in the above entitled action:

First. Plaintiff sustained by reason of the contact of his arm with the electric cable, injuries so serious that an amputation necessarily occurred to said arm; the same was amputated after operation about five inches below the shoulder, leaving a stump, which ever since said amputation and at the present time, is painful; plaintiff has forever lost the complete use of said arm, as if said arm had been entirely amputated for the reason that in the stump there nec-ssarily resulted atrophy; the plaintiff also sustained burns to his right hand, rendering same weak and disfigured, and causing a loss of all power in said right hand and also to his legs; the plaintiff also sustained a great, severe, lasting and painful nervous shock, and also
82 has suffered, still suffers and will continue to suffer from insomnia.

Second. The permanent injuries which plaintiff sustained are that the said arm was amputated about five inches below the shoulder, leaving a stump; that ever since said amputation, and at the present time is painful; plaintiff has forever lost the complete use of said arm, as if said arm had been entirely amputated for the reason that in the stump there necessarily resulted atrophy; the plaintiff also sustained burns to his right hand, rendering same weak and disfigured, and causing a loss of all power in said right hand and also to his legs; the plaintiff also sustained great, severe, lasting and a painful nervous shock, and has suffered, still suffers and will continue to suffer from insomnia, and also plaintiff's legs and right hand are permanently disfigured with scars thereon by reason of the foregoing, also pains in the stump of the left arm.

Third. Plaintiff has expended nothing for doctor's bills or medicines, said expenditures or debts having been expended or incurred entirely by plaintiff's father.

Fourth. Plaintiff was confined to a hospital for about three months, and was confined to his house thereafter for about two weeks.

Fifth. The exact manner in which the cable referred to in Paragraphs designated "11" and "25" of the amended complaint herein,

was insufficiently, improperly and carelessly insulated, covered or protected, was that the same did not have rubber or other
83 material covering the same to prevent the occurrence of an electric shock to the persons who came in contact with said uninsulated electric cable.

Sixth. The exact manner in which the bridge referred to in the "13" and "27" paragraphs of the amended complaint herein, was negligently maintained and operated, was that the defendant failed, notwithstanding *in* notice which it had, or in the exercise of reasonable care should have had, to guard against the presence of boys from the neighborhood upon said bridge, and in *committing* said boys to play upon said bridge, and in failing to insulate its wire at said point upon said bridge; in failing to place guards or other protections or to properly insulate the said cable at said point; in failing to warn boys or other persons from coming in contact with said cable, and in failing to post employees at said point to guard against boys playing upon said bridge, and near said cable.

Seventh. The manner in which the defendant was negligent in placing and maintaining the trellis work, and the steps thereof, as set forth in the "13" and "27" paragraph- of the amended complaint, are that the manner in which said trellis was constructed and erected upon said bridge, was that the same so closely resembled a stairway or ladder from near the said surface of the bridge, that the same constituted a stairway, and was a standing and a continuous invitation to boys and other persons upon said bridge to mount the said trellis work, as if the same were a stairway or a ladder; in that the defendant failed to post barriers or warnings upon said
84 trellis work or around the same; failed to place guards or warnings to prevent boys from ascending the same, and failed to construct same in such a manner that it could not be readily ascended, and because it failed to make same inaccessible from the portion of the bridge used by the travelling public.

Dated, New York, March 15th, 1920.

Yours, etc.,

LEON SANDERS,
Plaintiff's Attorney.

217 Broadway, New York City.

To: John M. Gibbons, Esq., Attorney for Defendant, Room 3840, Grand Central Terminal, New York City.

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Jenny Fruchter, being duly sworn, deposes and says, that she is the guardian ad litem of infant plaintiff in the within action; that she has heard read the foregoing bill of particulars and knows the contents thereof; that the same is true to her own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters she believes it to be true.

JENNY FRUCHTER.

Sworn to before me, this 15th day of March, 1920.

JENNIE LAPIDUS,
Commissioner of Deeds, New York City.

New York County Clk's No. 32, Reg. No. 22013.
Kings Co. Clk's No. 233, Reg. No. 2007.
Bronx Co. Clk's No. 2, Reg. No. 22002.
Term Expires Feb. 10, 1922.

85 *Extract from Clerk's Minutes.*

At a Stated Term of the District Court of the United States for the Southern District of New York, Held at the United States Court Rooms, in the U. S. Court House and Post Office Building, in the Borough of Manhattan, City of New York, on the 16th Day of August, in the Year of Our Lord One Thousand Nine Hundred and Twenty.

Present: Honorable William B. Sheppard, District Judge.

L. 20-271.

DAVID FRUCHTER, an Infant, etc.,

vs.

N. Y., N. H. & H. R. R. Co.

Now comes the plaintiff by Leon Sanders, his attorney, and George M. Curtis, Jr., of counsel, and moves the trial of this cause. Likewise comes the defendant by John M. Gibbons, their attorney, by James W. Carpenter, of counsel. Thereupon a jury is duly impaneled and sworn and the cause proceeds to trial. After hearing the evidence of respective parties, the arguments of counsel, and the charge of the Court, the jury on Thursday, August 19th, 1920, retire in charge of an officer duly qualified to attend them and upon their return say they find a verdict for the plaintiff in the sum of $10,000.00.

Motion to set aside verdict denied. Exception.
Execution stayed ten days after entry of judgment.
An extract from the minutes.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk.

86 *Judgment.*

United States District Court, Southern District of New York.

DAVID FRUCHTER, an Infant, by JENNY FRUCHTER, His Guardian ad Litem, Plaintiff,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

The above entitled action having been brought in the Supreme Court of the State of New York, and having been thereafter removed by defendant to this Court, and the issues in the above entitled action having thereafter been duly brought on for trial before Hon. William B. Sheppard, District Judge of the United States, at the Federal Building, and a jury, and the jury having duly rendered a verdict in favor of plaintiff and against defendant for the sum of $10,000.00, and plaintiff's costs and disbursements having been duly taxed herein at the sum of $118.03.

Now on motion of Leon Sanders, Esq., attorney for plaintiff, it is Adjudged that plaintiff, David Fruchter, an infant by Jenny Fruchter, his guardian ad litem, recover of defendant, The New York, New Haven and Hartford Railroad Company, the
87 sum of $10,000.00, together with $118.03 costs as taxed, making in all the sum of $10,118.03, and that plaintiff have execution therefor.

Dated, New York, August 24th, 1920.

ALEX. GILCHRIST, JR.,
Clerk.

Order Denying Motion for New Trial.

At a Stated Term of the District Court of the United States for the Southern District of New York Held at the United States Court Rooms on the 14th Day of September, 1920.

Present: Hon. William B. Sheppard, District Judge.

DAVID FRUCHTER, an Infant, by JENNY FRUCHTER, His Guardian ad Litem, Plaintiff,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

The issues in this action having come on regularly for trial before Hon. William B. Sheppard and a jury, at a Term of this
88 Court, on the 16th, 17th, 18th and 19th days of August, 1920, and the same having been duly tried, and the jury having

rendered a verdict in favor of the plaintiff and against the defendant in the sum of Ten Thousand Dollars ($10,000), and James W. Carpenter, of counsel for the defendant, having thereupon at that time and before the Judge presiding at the trial, upon the Judge's minutes and upon the exceptions taken at the trial, moved to set aside the verdict of the jury upon the ground that the same was contrary to the evidence and contrary to the law,

Now, after hearing counsel for the defendant, in support of said motion to set aside the verdict herein and for a new trial, and after hearing counsel for the plaintiff, in opposition thereto, and upon the minutes herein and the exceptions therein, and all the other papers and proceedings herein, and upon motion of John M. Gibbons, Esq., attorney for the defendant, it is

Ordered that the said motion be, and the same hereby is, in all respects denied.

WM. B. SHEPPARD,
U. S. D. J.

89 *Order Staying Proceedings.*

At a Stated Term of the United States District Court for the Southern District of New York Held at the United States Court House, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 14th Day of September, 1920.

Present: Hon. Martin T. Manton, U. S. Circuit Judge.

DAVID FRUCHTER, an Infant, by JENNY FRUCHTER, His Guardian ad Litem, Plaintiff,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

A judgment for the sum of Ten Thousand One Hundred and Eighteen and 3/100 Dollars ($10,118.03) in favor of the plaintiff and against the defendant having been entered in the office of the Clerk of the Court on the 24th day of August, 1920, and a Writ of Error having been sued out to reverse said judgment, it is

Now, on motion of John M. Gibbons, attorney for said defendant,

Ordered that execution and all proceedings in this suit be stayed pending the hearing and determination of the Writ of Error
90 and the coming down to this Court of the mandate of the United States Circuit Court of Appeals for the Second Circuit upon the filing by the defendant of a costs and supersedeas bond for Eleven Thousand Dollars ($11,000), approved by a Judge of this Court.

M. MANTON,
United States Circuit Judge.

Petition for Writ of Error.

District Court of the United States, Southern District of New York.

DAVID FRUCHTER, an Infant, by JENNY FRUCHTER, His Guardian ad Litem, Plaintiff,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

To the District Court of the United States for the Southern District of New York:

The petition of The New York, New Haven and Hartford Railroad Company respectfully represents:

91 On or about the 24th day of August, 1920, judgment was entered in favor of David Fruchter, an infant, by Jenny Fruchter, his guardian ad litem, v. The New York, New Haven and Hartford Railroad Company, to recover of the defendant the sum of Ten Thousand One Hundred and Eighteen and 3/100 Dollars ($10,118.03), and costs, in which judgment and during the trial of the cause, certain errors were committed by the Trial Court.

Wherefore, The New York, New Haven and Hartford Railroad Company prays that a Writ of Error be allowed to the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, and that the record and a copy of the proceedings upon the trial of said cause be sent to said Court of Appeals for further proceedings and to correct that error which of right and according to the custom of the United States ought to be done.

JOHN M. GIBBONS,
Attorney for Defendant.

Office and Post Office Address: Room 3840, Grand Central Terminal, Borough of Manhattan, New York City.

92 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you between David Fruchter, an infant, by Jenny Fruchter, his guardian ad litem, plaintiff, and The New York, New Haven and Hartford Railroad Company, defendant, a manifest error hath happened, to the great damage of the said defendant, as is said and appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice

done to the parties aforesaid in this behalf, Do Command You, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place before the Judges aforesaid, on the 14th day of October, 1920, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of
93 right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 14th day of September, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States the one hundred and forty-fifth.

ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.
M. MANTON,
United States Circuit Judge.

94 *Appeal Bond.*

Hartford Accident and Indemnity Co.,

Hartford, Connecticut.

[SEAL.]

Bond No. 155,629.

United States District Court, Southern District of New York.

DAVID FRUTCHER, an Infant, by JENNY FRUTCHER, His Guardian ad Litem, Plaintiff,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

Know all men by these presents, That we, The New York, New Haven & Hartford Railroad Company, as Principal, and the Hartford Accident and Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut, with an office at No. 84 William Street, New York, N. Y., as Surety, are held and firmly bound unto the above named David Frutcher, an infant, by Jenny Frutcher, his Guardian ad Litem, in the sum of Eleven

Thousand and 00/100 ($11,000.) Dollars, to be paid to the
95 said David Frutcher, an infant, by Jenny Frutcher, his Guardian ad Litem, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 11th day of September, 1920.

Whereas, the above named The New York, New Haven & Hartford Railroad Company has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the judgment dated the 24th day of August, 1920, rendered in the above entitled suit, in the District Court of the United States for the Southern District of New York, for Ten Thousand One Hundred Eighteen and 03/100 ($10,118.03) Dollars.

Now, therefore, the condition of this obligation is such, that if the above named The New York New Haven & Hartford Railroad Company shall prosecute an appeal to effect, and answer all damages and costs if it fail to make its appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

A. E. CLARK, [SEAL.]
Secretary.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

By F. J. MENIG,
Resident Vice-President.

Attest:

MM. J. McINTYRE,
Resident Asst. Secretary.

96 STATE OF CONNECTICUT,
City and County of New Haven, ss:

On this 13th day of September, 1920, before me personally came A. E. Clark, with whom I am personally acquainted, who, being by me duly sworn, says that he resides in Wallingford, County of New Haven, State of Connecticut; that he is the Secretary of said Company and knows the corporate seal thereof; that the said seal affixed to the annexed bond is such corporate seal; that it was so affixed by order of the Board of Directors of said Company, and that he signed said instrument as Secretary of said Company by like authority.

[SEAL.] WILLIAM R. HOWLAND,
Notary Public.

STATE OF CONNECTICUT,
County of New Haven, ss:

I, Alfred N. Wheeler, Clerk of the Superior Court, the same being a court of record within and for said County and State, and the officer authorized by the laws of the State of Connecticut to make the following certificate of the County of New Haven, do hereby certify

That William H. Rowland, Esquire, whose name is suscribed to the annexed instrument, and thereon written, and before whom the annexed acknowledgment, oath or affidavit was taken, was at the time of taking such acknowledgment, oath, or affidavit a Notary Public in and for said County of New Haven, residing in said County, duly authorized to take the same, and the officer
97 duly authorized by the laws of said State to take and certify the acknowledgment and proof of deed to be recorded in said State and further, that I am well acquainted with the handwriting of such officer, and verily believe that the signature to such acknowledgment, jurat or certificate is genuine.

In testimony whereof, I hereunto set my hand and affix the seal of said Court, at New Haven this 13 day of September, A. D., 1920.

[SEAL.] ALFRED N. WHEELER,
Clerk.

STATE OF NEW YORK,
County of New York, ss:

On September 11, 1920, before me personally came F. J. Menig to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Resident Vice-President of the Hartford Accident and Indemnity Company, the corporation described in and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and the said F. J. Menig further said that he is acquainted with W. J. McIntyre and knows him to be the Resident Asst. Secretary of said company; that the signature of the said W. J. McIntyre subscribed to the within instrument is in the genuine handwriting of the said W. J. McIntyre and was
98 subscribed thereto by him by like order of the Board of Directors and in the presence of him, the said F. J. Menig; and that the Superintendent of Insurance of the State of New York has, pursuant to chapter 33 of the Laws of the State of New York for the year 1909, constituting chapter 28 of the Consolidated Laws of the State of New York as amended by chapter 182 of the Laws of the State of New York for the year 1913, issued to the Hartford Accident and Indemnity Company his certificate that said company is qualified to become and be accepted as surety or guarantor on all bonds, undertakings and other obligations or guarantees, as provided in the Insurance Law of the State of New York and all laws

amendatory thereof and supplementary thereto; and that such certificate has not been revoked.

A. A. DUKE,
Notary Public.

New York County No. 293.
New York Register No. 1331.
Commission expires 1921.

At a regular and lawful meeting of the Board of the Directors of the Hartford Accident and Indemnity Company, at which a quorum was present, held at the office of the company, in the City of Hartford, State of Connecticut, on the 2d day of March, A. D., 1920, on motion, it was unanimously

Resolved, that Paul Rutherford, or V. A. Cullen, or F. J. Menig, Resident Vice-Presidents of the company in the State of New York,
be, and each of them is, hereby authorized and empowered to
99 execute and deliver, and to attach the seal of the company
to any and all bonds and undertakings on behalf of the company in its business of guaranteeing the fidelity of persons holding places of public or private trust; guaranteeing the performance of contracts other than insurance policies; guaranteeing the performance of insurance contracts where surety bonds are accepted by states or municipalities; executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law allowed; and indemnifying banks, bankers, brokers, financial or moneyed associations, or financial or money corporations against the loss of any bills of exchange, notes, drafts, acceptances of drafts, bonds, securities, evidences of debt, deeds, mortgages documents, currency and money, except that no such contract or indemnity indemnifying banks, bankers, brokers, financial or moneyed associations, or financial or moneyed corporations shall indemnify against loss caused by marine risks, or risks of transportation, or navigation; such bonds and undertakings, however, to be attested in every instance by one other of said Resident Vice-Presidents, or by W. J. Witschen, A. A. Duke, W. A. Earl, W. J. McIntyre, or W. J. McCarthy, Resident Assistant Secretaries of the company, as occasion may require.

STATE OF NEW YORK,
County of New York, ss:

I, W. J. McIntyre, Resident Asst. Secretary of the Hartford Accident and Indemnity Company, have compared the foregoing
100 resolution with the original thereof, as recorded in the minute
book of said company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said resolution, and that the same is still in full force and effect.

Given under my hand and seal of the company, at the City of New York, on September 11, 1920.

W. J. McINTYRE,
Resident Asst. Secretary.

Hartford Accident and Indemnity Company,

Hartford, Connecticut

Financial Statement, December 31, 1919.

Assets.

	Market value.
Government Bonds	$3,276,246.00
State, County and Municipal Bonds	1,061,030.00
Railroad Bonds	1,215,710.00
Miscellaneous Bonds	509,490.00
Loans on Mortgage (first lien)	190,000.00
	$6,252,476.00
Cash in Offices and Banks	1,170,105.08
Premiums in course of collection	1,788,444.28
Interest Accrued	77,000.17
Sundry Assets	209,312.65
Total Assets	$9,497,338.18

101 Liabilities.

Reserve for Claims and Suits		$3,400,028.77
Reserve for Unearned Premiums		3,296,978.58
Reserve for Commissions		379,645.65
Reserve for Premiums, over 90 days		57,304.60
Reserve for Taxes		173,878.00
Reserve for Sundry Bills, etc		22,884.25
Reserve for Bills Receivable, etc		46,557.48
		$7,377,277.33
Capital paid in	$1,000,000.00	
Net Surplus over all Liabilities	1,120,060.85	
		2,120,060.85
		$9,497,338.18

Surplus to Policyholders, $2,120,060.85.

STATE OF NEW YORK,
County of New York, ss:

I, W. J. McIntyre, Resident Asst. Secretary of the Hartford Accident and Indemnity Company, do hereby certify that the foregoing is a correct statement of the financial condition of said Company, as of December 31, 1919, to the best of my knowledge and belief, and

that the financial condition of said Company is as favorable now as it was when said statement was made.

W. J. McINTYRE,
Resident Asst. Secretary.

Subscribed and sworn to before me on September 11, 1920.

A. A. DUKE,
Notary Public.

New York County No. 293.
New York Register No. 1331.
Commission expires 1921.

102 *Citation.*

By the Honorable Martin T. Manton, U. S. Circuit Judge for the Second Circuit, to David Fruchter, an infant, by Jenny Fruchter, his guardian ad litem, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 14th day of October 1920, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein The New York, New Haven and Hartford Railroad Company is plaintiff-in-error, and you are defendant-in-error, to show cause, if any they be, why the judgment in said Writ of Error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 14th day of September, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States the one hundred and forty-fifth.

MARTIN T. MANTON,
U. S. Circuit Judge for the Second Circuit.

103 *Assignment of Errors.*

United States District Court, Southern District of New York.

DAVID FRUCHTER, an Infant, by JENNY FRUCHTER, His Guardian ad Litem, Plaintiff,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

On this 14th day of September, 1920, came the above named defendant, by its attorney, and shows that the judgment entered herein on the 24th day of August, 1920, in favor of the plaintiff and against

the defendant for Ten Thousand One Hundred and Eighteen and 3/100 Dollars ($10,118.03) is erroneous for the following reasons:

First. The Learned Court erred in denying defendant's motion for a non-suit made at the close of plaintiff's case, and for a directed verdict in its favor made at the close of the entire case, for the following reasons:

(1) The action was commenced and the trial was had on the so-called attractive nuisance theory on account of an accident occurring within the State of New York, and the Learned Court failed to follow and apply the law of said State in respect thereto, as declared
104 by the Court of Appeals of said State, and subsequently confirmed and followed by a long line of State decisions.

(2) The plaintiff was a trespasser, and defendant owed him no duty except to refrain from wilful and wanton negligence, of which there was no evidence.

(3) Even under the attractive nuisance theory of negligence, or any other, the plaintiff failed to prove the cause of action alleged, for the following reasons:

(*a*) The plaintiff testified, without contradiction, that he was not invited, lured or enticed to his injury by the defendant, but that he deliberately and wilfully climbed up to the scene of the accident knowing that he had no right there and that he was doing wrong.

(*b*) There was nothing attractive or alluring about the bridge in question or the defendant's wire or the strut which supported it, and the plaintiff testified, without contradiction, that neither they nor any of them attracted, enticed or lured him to his injury.

(*c*) Plaintiff was attracted and lured to the top of the bridge by a bird's nest and to the wire in question, attached to the strut located on top of the bridge, by a bird, over neither of which the defendant had any control.

(*d*) Neither the top of the bridge nor the wire in question was accessible, as defined in the attractive nuisance doctrine, nor was the plaintiff licensed to be there, expressly or impliedly.

105 (*e*) Defendant was not obliged to anticipate and provide for the contingency of the plaintiff or other children climbing to the top of this bridge belonging to the City of New York, and from there to the defendant's wire suspended approximately seven feet above it, the only access to which was via a standard steel strut, attached to the top of said bridge.

(*f*) Defendant was not required under Section 93 of the Railroad Law, or otherwise, to maintain guards, material or human so as to prevent the plaintiff or other children from climbing to the top of this bridge belonging to the City of New York.

(*g*) Defendant was not required to maintain guards, material or human so as to prevent, or to post warning signs so as to warn, plain-

tiff or other children from climbing up this strut and coming in contact with the wire in question.

(*h*) Defendant was not negligent in failing to install the device described by the plaintiff's engineer, for it was both inconvenient and impracticable.

(*i*) In maintaining the wire in question bare and uninsulated, except as against its supporting strut, under these circumstances defendant complied with the standards of practice prevailing under like conditions, and there was no proof to the contrary.

(*j*) The acts and omissions charged against the defendant were not the sole proximate cause of the accident.

106 (*k*) There was no evidence of negligence in defendant's construction of the bridge.

(*l*) In maintaining warning signs on the bridge and the struts and in assigning men to chase boys off the bridge, defendant more than fulfilled its obligation to the plaintiff and other children.

Second. The Learned Court erred in declining to charge, without qualification, as follows:

(1) Defendant was not obligated to use more than standard care established by the practice prevailing among companies operating such wires under similar circumstances.

(2) If the plaintiff knew he had no right there, he was a trespasser, and defendant owed him no active duty, and he cannot recover.

Third. The Learned Court erred in charging as follows:

(1) "They (meaning the defendant) are not insurers of the public against them, and the only liability that can be placed on the company in this case is whether or not, under the circumstances as the case has developed, whether the notice that they had received of the use of the bridge was sufficient to give them an opportunity to change the system, so as to prevent any injury that might take place, and if they did not do it, and if you are satisfied that it was negligence, in that they did not do it, and that the boy's injury was due to that carelessness on the part of the defendant, then plain-
107 tiff has made out a case by the preponderance of the evidence, and in that case, your verdict should be for the plaintiff."

(2) "Yes, gentlemen, the Court charges you, and I think I did charge you, that the defendant company is not required to adopt any different or other methods of installation of its wires than that commonly used by other companies that may use wires in that connection, and in that method of support, but you are to take into consideration in that connection, whether other companies, if informed of any practices that might have subjected children of this age to danger, then whether or not it would have been the duty of

any such company to have adopted means preventive of the danger that was inherent in the superstructure."

(3) "If the boy was conscious, and realized that he was doing wrong, and was doing wrong, and was doing a thing that was forbidden, and was capable of appreciating the consequences of what he was up to, then he would be contributing to his injury, and in that case you should find for the defendant."

Fourth. The Learned Court erred in permitting the plaintiff's electrical expert to testify that the construction and maintenance of the defendant's wires under the circumstances presented in the question put to him were unsafe, as appears from the following:

"Q. Now, assume that this was a public bridge, and part of a
108 highway at East 149th Street, New York City, and assume that it was used by children as well as adults, and assume that within 300 feet of this bridge, was a large tenament district, which houses a great many people and assume that it was possible, and not only possible, but the fact was that children did climb up around the structure of this bridge. Can you give us an expert opinion as to whether or not this construction of these wires, and this maintenance of these wires was safe?

Mr. Carpenter: I object to that question as incompetent and immaterial. He is asking whether he can give an expert opinion.

The Court: He is qualified as an expert, in electrical uses, and in electrical operation of these wires. This is his opinion, and that is all he is asked for. It is not binding, of course, on the jury. Answer the question.

Mr. Carpenter: Exception.

* * * * * * *

"Mr. Carpenter: Your Honor leaves in his opinion that in his opinion it was not safe?

The Court: Yes.

Mr. Carpenter: I move to strike it out, on the ground that it does not appear that he is basing that opinion as formed from his experience with companies using that type of structure, and I object to it as incompetent, irrelevant and immaterial.

The Court: Motion denied.

Mr. Carpenter: Exception."

109 Fifth. The Learned Court erred in declining to permit the defendant to cross-examine plaintiff's electrical expert as to the prevailing practice in respect to the maintenance of electrical wires under these circumstances, as appears from the following:

"Q. Have you made any investigation, I said, personally investigation, using your own eyesight and observation, of the prevailing practice?

A. In so far as possible, yes.

Q. Have you ever investigated the practice prevailing on the Norfolk & Western?

Mr. Curtis: That is objected to as incompetent, irrelevant and immaterial.

The Court: He has not said he knew anything about practice. He said he would consider, from his knowledge of electrical wires, and of this power, and from his observation of these particular ones, he said it was not safe to leave them in that particular condition. He never testified he had examined and inspected and gone around over these different railroad systems, and seen their operations and all that sort of thing.

Mr. Carpenter: Does your Honor maintain therefore that on behalf of this client, I cannot test his credibility, and see, by finding out, what he knows of the practice among these companies that I cannot ask him how they maintain these wires under such circumstances?

The Court: No. He has not qualified for that.

110 Mr. Carpenter: I take an exception to your Honor's refusal to permit me to cross-examine him."

* * * * * * *

"Q. When you said that this condition as you saw it there was unsafe in your opinion, in what respect was it unsafe, and to whom was it unsafe?

A. In my opinion it was unsafe, because children finding this bridge, might easily come in contact with its wires, and it was unsafe in this way, that it was my opinion, when I inspected it, that it was easily possible to get rid of this danger, by a very simple device from the structure underneath the wires. To that extent I call it unsafe. Apparently, the precautions were not taken which could have been taken.

Q. Can you name a company which has those wires which has taken those precautions?

Mr. Curtis: I object to it, your Honor, as cross-examining on a subject he brought out himself.

The Court: Objection sustained. That is the answer to your own question, whether or not it would have been made safe.

Mr. Carpenter: I am asking him whether he could name any company which has those wires, which has taken those precautions.

The Court: That is going right back to the question. Objection sustained.

Mr. Carpenter: Exception.

Q. This structure which you have in mind, is what type
111 of structure? What is it made out of?

A. The structure I have in mind would be an iron lattice work, built underneath the wires, above the top part of the bridge, so that any boy getting on the top of the bridge, could not, even though he tried, touch these wires. It would be simply an iron mesh, such as is used in banks and for other purposes, to protect for other purposes.

Q. Now, referring to Plaintiff's Exhibit No. I, in your opinion, to make this place safe, you would have to, underneath these wires, you would *would* construct a lattice work, completely covering the space underneath these wires? Is that what you mean?

A. I would construct a lattice work covering the place underneath the wires to such an extent that a boy standing on the top girder of the bridge, could not touch the wires. That is, for a distance perhaps of two feet on either side of the girders of the bridge, so that the whole structure, underneath these wires, would be perhaps six feet long, along the wires.

Q. Extending out three feet from either side of the uprights which hold the wires?

A. Extending out three feet from either side of the top girder, on which the boy might be standing.

Q. It would be above his head?

A. Yes, it would be above his head.

Q. The lattice work would be above his head as he stands on top of the girder?

A. Yes, sir.

112 Q. And it would be out from the uprights, which hold these wires, three feet on either side?

A. Yes, sir.

Q. And underneath these wires?

A. Yes.

Q. And if that had been done, you would consider this place safe?

A. Then, in my opinion, the installation would have been safe.

Q. Have you borne in mind the distance that those wires were above that bridge?

A. I have.

Q. Above the top of the bridge?

A. Yes.

Q. How high were they?

A. Approximately six feet.

Q. Do you tell this Court and jury that a boy, six or seven years old, could reach six feet up, and touch this wire when standing on the girders?

A. I did not.

Q. So, if he was on top of the bridge, he would not come into the zone of danger, until he climbed the structure?

A. It would depend on how big the boy was.

Q. Assuming the average boy, seven years old. Stand up. The Fruchter boy will please stand up. All right. Never mind. The average boy, seven years old.

A. The average boy seven years old could not reach six feet above his head, I presume.

Q. You concede that, don't you?

Mr. Curtis: Of course, we concede it."

* * * * * * *

Q. Can you name any company that has any such practice as that in use?

Mr. Curtis: I object to it.
The Court: Why do you want to repeat that? I sustain the objection.
Mr. Carpenter: Exception. That is all."

113 Sixth. The Learned Court erred in declining to declining to permit the defendant to prove that considering the function of the wire in question, the protective device recommended by plaintiff's electrical expert as impracticable, as appears from the following:

"Q. Now, can you tell from the standpoint of function, bearing in mind the function which these wires perform, whether it was practicable to have such a device?

Mr. Curtis: I object to that.
The Court: I exclude that question.
Mr. Carpenter: May I have an exception?
The Court: Yes."

Seventh. The Learned Court erred in declining to permit the defendant to introduce in evidence its contract with the City of New York, showing its limited proprietary interests, if any, in the bridge in question, and that its contractual obligation in respect to the maintenance of the bridge superstructure was no greater than that imposed by Section 93 of the Railroad Law of New York, as appears from the following:

"Mr. Carpenter: I am embarrassed to know what the situation of the proof is, and I ask your Honor to permit me to subpœna the original contract between the City of New York and the New Haven Railroad Company, for the purpose of showing the proprietary interest of the New Haven Railroad Company in that bridge.
Mr. Curtis: And that would not be pertinent anyway, because they cannot bind us.
114 The Court: I will refuse the application at this time, because I do not think, with the admissions that were made by plaintiff's counsel in court, I think that such contract is immaterial, it being admitted that the public had the use and ingress and egress over the street part of this bridge.
Mr. Curtis: Your Honor is correct, as a matter of law.
Mr. Carpenter: May I have an exception to your Honor's ruling?
The Court: Yes.

Eighth. The Learned Court erred in making exceedingly harmful and prejudicial comments in the presence of the jury upon the defendant's attempt to lay the foundation in cross-examining the plaintiff for the introduction of statements made by the plaintiff about three weeks after the accident contradicting his testimony in Court, and in limiting the defendant's cross-examination of the plaintiff on the question of his credibility; and the Learned Court also erred in declining defendant't motion to withdraw a juror, as appears from the following:

"Q. And when you were in the hospital did you make any statement to anybody from the railroad company about how this accident occurred?

A. No, sir.

Q. When I say a statement, David, I mean did you talk with anybody there about how the accident happened, or how you got hurt?

A. No, sir."

* * * * * * *

"Do you remember seeing Mr. Hildrich at all?

A. No, sir."

* * * * * * *

115 "Q. Don't you ever remember Dr. Flynn, who was the same doctor who was there by you, and this gentleman was there, that I have had just stand up, and that you talked with them about this accident? Don't you remember it?

A. No, sir."

* * * * * * *

"Q. Do you remember seeing him (indicating Mr. Mulcox) there in the hospital, when he was taking some notes down of what you said?

Mr. Curtis: I object to that as to form.

The Court: Objection sustained.

Mr. Carpenter: Exception.

The Court: Will you undertake to offer in this case anything that this child said under such an examination as that, and would you undertake to offer something which is written, made by them, when the law does not recognize that what they did they are bound by?

Mr Carpenter: Simply to show the boy's recollection at a time when it was fresher than it is now.

The Court: Didn't the surgeon testify yesterday that he was under the influence of opiates for two months?

Mr. Carpenter: I submit if your Honor please, that at the time the statement was taken, if his recollection was good, when he was describing what he knew about the accident, that this is very material.

The Court: It is for the jury to determine as to what the boy said under such circumstances, rather than the statement of men who wrote what he did say.

116 Mr. Carpenter: I must except to your Honor's remark. It seems to me, if your Honor would stop to consider——

The Court: I won't say, really, what I think about such an examination, but go on with you- examination.

Mr. Carpenter: May I have an exception to your Honor's remark?

The Court: Yes. Take it. I understand that it is the law, throughout the United States, and as old as the common law itself, that an infant is not bound by his contracts, or even by what he signs and seals. He has the right, within a reasonable time after he is 21 years of age, to refute the most solemn contract, and then, to

undertake to bind the plaintiff, seven years old, in a statement he made about this thing.

Mr. Curtis: Your Honor will recall the questions at the time the doctor said he was under opiates for his pain.

The Court: You may ask what he said, and all that.

Mr. Carpenter: If your Honor please, I do not wish your Honor to misunderstand my position. I assumed that it was fundamental that I could, in showing the credibility of a witness, whether he was a boy or a man, that I could examine him on a statement that he made soon after the occurrence.

The Court: I simply suggested that if you are proposing to lay a predicate for the introduction of a statement made to some
117 agent, or to some doctor, under the circumstances under which this boy may have made it in the hospital, it would not be admitted, and I say it here again.

Mr. Carpenter: I must *respectively* except.

The Court: Go on and examine your witness and see whether he is credible.

Mr. Carpenter: I must respectfully except, it seems to me, your Honor, that the remark in this very serious case, has been so prejudicial to the defendant, that I am really entitled to a withdrawal.

The Court: It is not intended, gentlemen of the jury, to prejudice you against the company, the defendant in this case at all, but I am simply suggesting to counsel what I think would be a proper ruling when such a document is presented, under circumstances as disclosed by the testimony, so far as adduced in this trial.

Mr. Curtis: Under the United States practice, as we all know, a Judge can say what he thinks about the evidence.

The Court: It does not control the minds of the jury. A Judge can comment upon the testimony in his charge, but the jury will be left free and untrammeled in their opinion as to what they are to believe.

Mr. Carpenter: I submit, if your Honor please, in view of what you have already stated, that it seems to me reflecting on my own conduct, that it has been prejudicial to my client in this case, and I certainly never had any intention of doing anything which would be prejudicial. I have been attempting to try this case
118 fairly, and for the best interests of the defendant in this case.

The Court: I have said nothing, except to indicate what the ruling of the Court would be upon an attempt to introduce a document contradicting the witness, and this seems to be a predicate for it.

Mr. Carpenter: But your Honor went outside of that, and prejudiced the weight of that evidence if it comes in later. I don't know what your Honor will rule, and I contend your Honor absolutely destroyed it, by the statement of the position your Honor has taken.

The Court: Not at all. When you get to that point, it is a matter for the admission of such a document, and the Court will determine it.

Mr. Carpenter: May I have an exception to your Honor's ruling that I am not entitled to a withdrawal at this time?

The Court: Yes."

Ninth. The Learned Court erred in preventing the defendant from introducing in evidence the statement that plaintiff made in the hospital, showing that he appreciated the danger of coming in contact with a live wire, as appears from the following:

"Q. Do you remember this taking place, David? 'Q. What do you mean by a dead wire? A. It ain't a live wire. Q. What is a live wire? A. It burns you.' Q. Do you remember that taking place?

Mr. Curtis: We object.

The Witness: No, sir.

119 The Court: That has nothing about reading. I exclude that question and answer on the ground that the defendant exhausted his cross-examination when he had the witness after the direct-examination.

Mr. Carpenter: If your Honor please, I offer this for the purpose of showing that this boy knew from the signs on the bridge at the time of the accident, that there were signs posted there.

The Court: That question does not include anything about a sign on the bridge.

Mr. Carpenter: I know, but in my former questions to him, I showed that signs were discussed there.

The Court: There is nothing about his reading any signs.

Mr. Carpenter: Why, your Honor, I asked the question.

The Court: And I excluded the question. Take your exception.

Mr. Carpenter: I except."

Tenth. The Learned Court erred in making harmful and prejudicial comments when the defendant introduced in evidence the statements made by the plaintiff shortly after the accident, showing that in going into the superstructure of the bridge he knew he had no right there, as appears from the following:

Q. Do you remember asking him (meaning plaintiff) this question—'Q. Did you know that you had no right?' and do you remember his making this answer, 'A. No.' And then do you
120 remember asking this question: 'Q. You knew that you should not go up there?' and do you remember his answering, 'A. Yes, sir.' Q. Do you remember that?

A. I do, yes, sir.

Q. Do you remember this taking place—'Were you afraid when you went up there that the men would catch you? A. No, there was no man near me. Q. How do you know there was no man near you? A. I saw. Q. You looked? A. Yes.

Mr. Curtis: I object to this. He must ask him the direct questions, and not question and answer. The rule is, did he say so and so, yes or no, did he make such and such a statement, yes or no.

Mr. Carpenter: I have a right to ask him these questions.

The Court: I do not quite get the point.

Mr. Curtis: I say that I object. That the rule is, in this State, to ask him, did he say so and so, and this witness must answer yes or no.

The Court: They may look upon it with the seriousness and solemnity of a deposition, but nobody else would.

Mr. Curtis: That is just why I object to it. That is just what he is trying to do now.

Mr. Carpenter: I object to that statement.

Mr. Curtis: I repeat it.

The Court: If counsel wants to use it let him go ahead.

Mr. Curtis: I do not object to him using it.

121 The Court: Just ask the witness what the interview was.

Mr. Carpenter: Do you mean he should state what the entire interview was?

The Court: No, not the particular subject.

Q. And did this take place? 'Q. And when you saw there was no man there, what did you do? A. Went up.'

Mr. Curtis: I object. Nobody knows better than Mr. Carpenter, that he must follow the rule of our practice.

The Court: What does it amount to in a case of this kind? I don't know what the courts of this State hold, but if they hold that that was binding on the plaintiff, an inference, under the circumstances, it would not bind me. I do not care what the authority was in the State of New York.

Did that take place?

A. It did.

Mr. Carpenter: Before putting this next question, I think I must except to your Honor's statement as just made, on the ground that it is unfair.

The Court: Very well.

'Q. And then when you saw there was no man there, what did you do? A. Went up. Q. You went up? A. Yes, sir, there was a man working far away.' Did that take place?

A. It did."

* * * * * * *

"Q. Where was the boy when this conversation took place?

A. Lying in bed in the ward.

Q. Public or private?

A. Public

122 Mr. Curtis: That is objected to as incompetent, irrelevant and immaterial.

The Court: What difference does it make?

Mr. Carpenter: I want to show this railroad treated the boy in a proper manner, and did not deal unfairly with him."

Eleventh. The Learned Court erred in making harmful and prejudicial comments when the defendant offered evidence to show that the protective device recommended by the plaintiff's electrical expert

was impracticable in view of the multitude of struts along the defendant's right of way which were accessible to children and therefore would have to be protected if the opinion of the plaintiff's expert was sound, as appears from the following:

"Q. How many struts are there on this bridge, and of a nature similar to the one at 149th Street, how many struts are there on bridges on the New Haven Road, similar to the one you have described, to the best of your recollection?

A. Upward of 2000.

Q. What is the length of the electrified line of the New York, New Haven & Hartford Railroad Company?

Mr. Curtis: That is objected to.

Q. Between the two terminals?

The Court: What is the purpose of this?

Mr. Carpenter: Why, to show that the method which their so-called expert testified to, is utterly impracticable.

Mr. Curtis: On account of the expense.

The Court: About this wire mesh?

Mr. Carpenter: Yes.

123 The Court: He said it was not practicable to do it that way. What more do you want. He is an expert, and there is a conflict between the two.

Mr. Carpenter: I submit that we ought to have before us, in weighing the credibility of his opinion, the physical situation on which it is based.

The Court: Where?

Mr. Carpenter: Along the line.

The Court: From here to Hartford or Boston?

Mr. Carpenter: Yes.

The Court: You might as well go into the cost of excavating over here at Westchester, on that line. It is just about as material. We are talking about the bridges. The only thing the Court and the Jury are concerned about is the construction of the bridge, and the wires over that bridge, and whether they were up to the standard, and whether they are safe or not, and whether it was impracticable.

Mr. Carpenter: In the Supreme Court case, in the Stout case, the Court laid down the proposition that it was material.

The Court: Yes, I know. I read it. I read an opinion where the Courts all go into it, and even comment upon the fact, and go into the cost of the land, and how much money was paid for the land, and even the cost of each telephone pole, and all such things, as if that had anything to do with whether or not there was carelessness.

Mr. Carpenter: Has your Honor seen that Supreme Court decision?

124 The Court: Of this State?

Mr. Carpenter: No, the United States. The Stout case.

The Court: Produce it. Your construction of it may be different from mine.

Mr. Carpenter: May we send for it?

The Court: Go on with your questions.
Mr. Carpenter: Very well.

Q. Can you state from your experience and knowledge of steel values and labor costs, whether from the standpoint of the cost alone, it would be practicable for this railroad to use the device which the plaintiff's expert described?

Mr. Curtis: That is objected to as incompetent, irrelevant and immaterial, and furthermore, that no question of safety is measured by dollars, and that furthermore——
The Court: I will overrule your objection.
Mr. Curtis: And further the Supreme Court does not agree with Mr. Carpenter, in spite of the assertion of counsel.
The Court: Objection overruled. If this witness can testify that it was impracticable to do that, because it would bankrupt the company, why then, he may draw his conclusion, and say so, but that is his opinion, and the jury is not bound by it. The jury can accept it, but they have opinions of their own, and are entitled to exercise their own common sense and judgment.

These questions are not absolutely binding on anybody. It
125 is merely for light and explanation, which experts are always called for in Court. You argue over something just as if it was a decree from Washington, from the Supreme Court, and an opinion written by the Chief Justice.

Q. His Honor says you may answer it.

The Court: I am surprised that juries are kept here to listen to these immaterial matters in question, and the Courts ought to take it in hand.
Mr. Carpenter: May I except to your Honor's remark as to its being immaterial?"

Twelfth. The Learned Court erred in permitting the plaintiff to ask the defendant's electrical expert whether it was possible to construct a wooden conduit about the wire in question, as appears from the following:

"Q. You could stretch a wooden conduit, a wooden construction, having a bottom and two sides to it, by attaching such construction at each end to the bonnet, and at intervals say of 8 or 10 feet, below the uprights, from the top girders of the bridge, to support that wooden structure, could you not?

Mr. Carpenter: I object to the question as incompetent and immaterial, and especially upon the ground that he does not make any suggestion as to how it could be done.
The Court: Objection overruled. I understand the purpose of it. This witness was asked whether it was practical or not, and this cross-examination tends to show whether it is or isn't.
126 Mr. Carpenter: Exception. I object to the particular question on the ground that it is merely assuming that it could be done.

The Court: Objection overruled.
Mr. Carpenter: Exception. I object to it on the further ground that his own expert when on the stand, never suggested any such device, and they are bound by him, on their theory of the case.
The Court: Objection overruled. I am not going to consume more time. This case ought to close.
Mr. Carpenter: Exception."

Thirteenth. The Learned Court erred in preventing the defendant from asking its electrical expert whether the trough like conduit suggested by the plaintiff's attorney for the protection of the wire had ever been adopted in practice under these circumstances, and if not, why it was not practicable, as appears from the following:

"Q. Do you know of any railroad in the country that has ever adopted a trough like structure, made of wood, and concrete, which was described by Mr. Curtis in his hypothetical question? Do you know of any railroad that has ever adopted that practice?
A. I would like to know for what purpose.
Q. For protecting wires carried over a bridge similar to the situation at 149th Street?
A. I do not.
Q. And will you state why that would not be, in your opinion, practicable?

Mr. Curtis: I object to that, if your Honor please.
127 The Court: No, you need not go into that.
Mr. Carpenter: I except.
The Court: Yes.

Q. Do you know of any engineer or board of engineers that have ever made any such recommendation for such a device, under such circumstances?

Mr. Curtis: That is objected to.
The Court: I will exclude that.
Mr. Carpenter: Exception."

Fourteenth. The Learned Court erred in rejecting the defendant's offer as evidence of the stenographic minutes and typewritten statement made therefrom of the interview with the plaintiff in the hospital, as appears from the following:

"Q. I hand you this document, Mr. Mulcox (handing statement to the witness) and ask you if that is the typewritten statement and also your notes?
A. Yes, sir.
Q. That you took that day?
A. Yes, sir.

Mr. Carpenter: I offer it in evidence.
Mr. Curtis: I object to it as entirely improper.
The Court: Objection sustained.

Mr. Carpenter: Exception. Can I have it marked for identification?

The Court: Yes.

Statement marked Defendant's Exhibit D for identification."

Fifteenth. The Learned Court erred in refusing to take judicial notice of the fact that the Appellate Division of the Supreme
128 Court of the State of New York is the next highest Court to the Court of Appeals after the defendant had produced evidence that the stenographic notes of the plaintiff's statement in the hospital was taken by Mr. Mulcox, who, at the time of this trial was confidential clerk and stenographer of Judge Smith of the said Appellate Division, as appears from the following:

"Mr. Carpenter: I ask your Honor to take judicial notice and charge the jury that the Appellate Division of the Supreme Court of New York is the next highest court to the Court of Appeals.

The Court: Yes, but they do not prescribe rules of procedure for Federal Courts.

Mr. Carpenter: No, but I merely ask your Honor to take judicial notice of that position.

The Court: This is not a document or evidence that was produced in court, and therefore it is purely ex parte, to read the answers given there.

Mr. Carpenter: Exception. That is all."

Sixteenth. The Learned Court erred in making harmful and prejudicial comments when the defendant attempted to attack the credibility of the plaintiff's witness, William Goll, after he had testified that the defendant placed the warning signs on the bridge subsequent to the accident, and in limiting the defendant's cross-examination seeking to establish the incredibility of the witness, as appears from the following:

"Q. As an officer of the law, you made no report?

A. I made no report.

129 Q. That those signs were not there at the time of the accident?

Mr. Curtis: We object to it upon the ground that it assumes he was under some obligation to report with regard to signs, which is absolutely without foundation.

The Court: Unless there is some ordinance or some such rule.

Mr. Curtis: There is no such ordinance or rule.

The Witness: I never made a report.

The Court: Do not let us take so much time in going into these things.

Mr. Carpenter: Does your Honor mean that I am not conducting this examination properly?

The Court: No. I am just putting you on notice that you should not go into reasons for something that is not required by law. You can take an exception if you desire.

Mr. Carpenter: Exception.

Q. Do I understand that *the* the time in question, that you felt that this railroad was at fault in not having these signs there?

Mr. Curtis: That is objected to.
The Court: Objection sustained. I do not want any reasons or any argument from this witness.

Q. When did you first make this statement, which you have made here today, that there were no signs on this bridge, such as you have described, on the upper part of the bridge, stating that there
130 were live wires there. When did you first make this statement?

The Court: Do you recollect? If you do not know, say you don't know.
The Witness: I don't know.

Q. Did you discuss it with anybody?
A. I did, yes.
Q. When?
A. Two weeks ago.
Q. That is the first time?
A. That is the first time.
Q. So from the time of the accident in 1916, down to date, until two weeks ago, you never discussed its feature, about the lack of those signs, is that right?
A. That is right.
Q. And as a police officer you saw many accidents, I suppose?
A. Yes, sir.
Q. And made many reports?
A. Yes, sir.
Q. And you have testified in many cases?
A. I did.

Mr. Curtis: I object to that.
The Court: Objection sustained.
Mr. Carpenter: Exception."

* * * * * * *

"Q. Why is it that you recall that date. Tell this Court and jury what event fixes that time in your mind, as being about the time that those signs were put there?

A. Because there was an accident occurred there, and every time I passed that bridge, I thought of this bridge, and thought of this accident, and I always looked to see if it was properly guarded against another accident of the same kind.

131 Q. Do you tell the Court and jury that another boy or some other accident occurred, and that another boy was burned on that bridge?

A. There was a boy, one time. The one boy. I did not say he was burned out on that bridge, but there was a boy burned on the wires that went under the bridge.

Q. What accident are you referring to now, when you say that there was an accident that caused this to come to your mind?

A. I did not have the case. That is the reason I do not remember the particular of the case, but I remember the time. A boy climbed over the railing, the guard railing, a little higher up, and he must have fallen on these wires.

The Court: Counsel asked you about the signs that were put up on the top wires, and what caused you to look and remember about it. How did you come to note the fact that the sign was put up on the top wires? Not in those lower wires, because that refers to a collateral issue, and has nothing to do with this case.

The Witness: Seeing that this accident had occurred, of course I took particular notice to see if there were proper precautions taken so as there wouldn't be another accident of that kind.

The Court: You are speaking of the accident to the Fruchter boy?

The Witness: Yes, sir.

Q. You had nothing to do with this accident to the other boy, down under the bridge? You made no report of it, and had
132 nothing to do with it?

Mr. Curtis: I object to it.

The Court: Objection sustained. We are not going into the trial of that case at this time.

Mr. Carpenter: I am not going into that, your Honor, and I take an exception.

Q So I understand that that other accident with that other boy, has nothing to do with this.

—. ——.

Q. Have you refreshed your recollection as to when these signs were put up there for the first time?

A. No.

Q. It is not refreshed?

A. No.

Q. So that when you said a moment ago that the reason you knew it was about two weeks, because of an accident, which accident did you refer to?

Mr. Curtis: I object to that as already answered.

The Court: Objection sustained.

Mr. Carpenter: Exception.

The Court: I am going to see that this case is conducted with some expedition, or else we will know it.

Mr. Carpenter: Now, if your Honor please, I contend——

The Court: I do not see the necessity of going into all these collateral matters, unless it is to test the credibility of the witness.

Mr. Carpenter: We are trying to test his credibility on the question as to when——

The Court: Do it with pertinence, and with a proper question.

133 Mr. Carpenter: I submit, if the Court please, that that is not a proper criticism.

The Court: The Court is the proper one to submit it to. I will conduct the trial, and if other Judges would do the same thing, there would not be these cases going on here for four or five years, without getting to trial.

Mr. Carpenter: I must except to that, your Honor.

The Court: Very well.

Mr. Carpenter: I say it is not fair to my client or to myself, under these circumstances.

The Court: Very well. Take it down."

Seventeenth. The Learned Court erred in permitting the plaintiff's witness to testify to remarks made by laborers working in the vicinity of the bridge when boys were playing in the superstructure of it, as appears from the following:

"Q. Mr. Wohl, you were asked yesterday some questions with regard to seeing people in and around the railroad track at any time that you were on the bridge?

A. Yes, sir.

"Q. I understand that in describing the picture here yesterday, at the rail, to the jury, you stated that one of those men had said something that you heard?

A. Yes.

Q. Is that right?

A. Yes, sir.

Mr. Carpenter: I object to what Mr. Curtis understood.

Q. I will follow it up this way. Did any of those men at any time, that you say you saw under the bridge, did any of
134 them at any time say anything that you heard while you were climbing up on the bridge?

Mr. Carpenter: I object, unless it is first shown that those men were employees of the New York, New Haven & Hartford Railroad Company, and were authorized.

The Court: That goes for what it may be worth. If they were men working around, shoveling dirt, and driving stakes, it depends on what they were doing. It may be an inference that they were employees.

Mr. Carpenter: Suppose somebody else was there, and made some remark, would it be binding?

The Court: No. He does not know, but the jury are entitled, from the circumstances shown, to decide for themselves.

Mr. Carpenter: May I have an exception, your Honor?

The Court: Yes.

Q. Do you know what the Court says now?

A. Yes, sir.

Q. When did you ever hear any of the men that you saw working the tracks there, say at any time while you were up on the bridge—what did you ever hear them say?

A. 'Look at them damned kids on the bridge there.' They never chased us or nothing. They just said, 'Look at them damned kids."

Wherefore, defendant prays that said judgment be vacated, set aside and a new trial granted to the defendant herein.

JOHN M. GIBBINS,
Attorney for Defendant.

Office and P. O. Address, Room 3840, Grand Central Terminal, New York City.

135 *Testimony.*

United States District Court, Southern District of New York.

Before Hon. W. B. Sheppard, J., and a Jury.

SAM FRUCHTER, Plaintiff,

vs.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, Defendant.

DAVID FRUCHTER, an Infant, by JENNY FRUCHTER, His Guardian ad litem, Plaintiff,

vs.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, Defendant.

New York, August 16, 1920.

Ap-earances:

Leon Sanders, Attorney for the Plaintiff, George M. Curtis, of Counsel.

John M. Gibbons, Attorney for the Defendant, James W. Carpenter, of Counsel.

A jury was impaneled and sworn.

136 Mr. Curtis: If your Honor please, I ask permission to exercise a fourth peremptory challenge, having used three.

The Court: Motion denied, on the ground that you have exercised all the challenges to which you are entitled.

Mr. Curtis: We respectfully except, your Honor, upon the ground that we claim that we are entitled to the practice in the State Courts, which gives us six.

Mr. Curtis opened the plaintiff's case to the Jury.

Mr. Carpenter: May it please your Honor, I served a notice upon Mr. Curtis about a week ago, believe it was, to amend the defendant's answer with respect to paragraph four of the complaint, which paragraph of the complaint reads as follows:

"4. On information and belief, that at all the times hereinafter mentioned, and for many years prior thereto, defendant has continuously been engaged in maintaining and operating as a common

carrier of persons and freight, a railroad line through the State of Connecticut to and into the City of New York and in connection therewith and as a part of said system did build a certain bridge across and above its tracks at 149th Street, which is a public highway, in the Borough of Bronx, City of New York, and as a part of said bridge and railroad system and public highway, did incorporate certain signal erections or structures, access to which was obtained from the ground by a flight of steps, consisting of trellis work
137 constructed from the ground to said signal erection or structure."

That was admitted in the original answer, and I make the motion to amend, so that we deny it, upon information and belief.

Mr. Curtis: We object to that, if your Honor please.

Mr. Carpenter: In other words, we deny that this structure was built as alleged, and put them to their proof.

The Court: How will the plaintiff be prejudiced?

Mr. Curtis: In this respect, that under the original answer, they admit the construction of the bridge. They admit the construction of the signal apparatus, they admit that part of the construction of the bridge was trellis work.

The Court: Now they neither deny or admit it, but leave it to the plaintiff to prove.

Mr. Curtis: They did admit that in the original answer, and the point is this, where you sue a corporation in this way, if they in any way deny that which is material, you have a right to go to Court and ask for an examination of them before trial. I say it is a very important part of our case. They have admitted that the bridge was constructed by the railroad, and had the railroad appurtenances, and now they come in, and this last amendment, and which Mr. Carpenter has read to your Honor, was not served upon us until last Friday. We have answered ready since Monday.

The Court: That being a matter which addresses itself to the discretion of the Court, the question is whether or not it is
138 going to put — to great inconvenience to meet this, or whether it is going to put you to great expense.

Mr. Curtis: Not only great expense, but great difficulty to reach the officers of this corporation, and it causes a hardship to the plaintiff. How am I going to prove the fact that these signals were erected by them at this stage of the case? It is not so easy to get the officers of this company under subpœna, and I know whereof I speak.

The Court: The- were permitted to and had used it?

Mr. Curtis: If they admit they built the bridge, I can prove this trellis work was there for years before the accident, because it must have been there when the bridge was built.

The Court: Do you say it is necessary to prove what directors of the company ordered that?

Mr. Curtis: No, sir.

The Court: I do not think you ought to be permitted to amend now, so as to bring your proof in at the last hour, and if you are

going to put in any such proof. I think you should have attended to it at the proper time.

Mr. Carpenter: It alleges a series conclusion, and my predecessor in this case, who was the attorney of record, was not informed of the fact that at the time the bridge was built, these overhead structures were not part of it at all. As I am informed, five years intervened between the construction of the bridge, and the construction of these wires, so that when he alleged that we maintained a series of steps from the floor of the bridge to the overhead wires, he is alleging facts which are not facts, and therefore I am forced
139 into a position where, having found this out since the original answer was made, that I truthfully can not admit it. Our own engineers tell me that five years intervened, so that the superstructure was not part of the original bridge. The trellis work was built, not for the purpose of access, or stairs, but as an engineering question, of supporting an amount of traffic contemplated between the New Haven and the City of New York.

The Court: Couldn't you change it to say that they adopted it, and acquiesced in its construction? That would relieve you of any proof.

Mr. Curtis: That is satisfactory, your Honor. We admit they were not put there for steps. We have no objection to that, but I was not put on any warning that Mr. Carpenter was going to come in, and say they did not construct it.

Mr. Carpenter: I concede we constructed the overhead signal work, but am denying, as a conclusion, that that was constructed as part of the bridge, or part of the highway.

The Court: And you claim that it was permitted by the defendant company to exist in its present dangerous condition?

Mr. Curtis: Prior to the accident.

Mr. Carpenter: However, I could not admit construction.

The Court: Then just say it is there.

Mr. Curtis: And was maintained by this defendant prior to the day of the accident.

Mr. Carpenter: May we have it on the record?

The Court: Unless you amend in the way I suggest, he ought to be permitted to deny it.

Mr. Curtis: We amend, so as to add that this bridge in
140 question at East 149th Street, mentioned in the complaint, was constructed by this defendant, and at the time of the accident, and at least one year prior thereto, this defendant had either constructed or permitted the construction and maintenance of a series of signal appliances at the top of this bridge, such appliances having as part and parcel of the same, electric wires.

The defendant withdraws his motion to amend the pleadings, in view of the plaintiff's amendment to the complaint.

Adjourned to Tuesday, August 17, 1920, at 10 a. m.

FRUCHTER

vs.

NEW YORK, NEW HAVEN & HARTFORD R. R. CO.

New York, August 17, 1920.

Mr. Curtis: It is admitted that the mother was duly appointed as guardian ad litem to prosecute this action.

JENNY FRUCHTER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Curtis:

Q. What is your name?
A. Jenny Fruchter.
Q. Now, Mrs. Fruchter, I want you to talk up.
A. Yes, sir.
141 Q. Just as I am going to do?
A. Yes.
Q. Where do you live?
A. 630 Concord Avenue.
Q. Are you the mother of David Fruchter?
A. Yes, sir.
Q. How old was he in June of 1916, at the time he was hurt?
A. Not quite eight years.
Q. Was he seven years and some months?
A. Seven years and some months, yes, sir.
Q. And had you other children at that time?
A. Yes, sir.
Q. Which ones?
A. What.
Q. Who?
A. Four.
Q. What other children?

Mr. Carpenter: I do not think that is material, your Honor.
Mr. Curtis: On the question of the plaintiff's loss of services. However, I won't press it.
The Court: Very well.

Q. Before the day of this accident, had David ever had any other accident?
A. No, sir.
Q. Can you tell the Court and jury whether before that, he appeared to be in good health?
A. He was always in good health.
Q. On the day of this accident, Mrs. Fruchter, tell his Honor and

the jury what you did in regard to David, and where he was and what you told him?

A. I just gave him two cents, and I told him to go down and buy some candy. It was just the next door from me, and he went out, just like a boy.

Q. You told him to go out and buy some candy?

A. Yes, sir, I told him to go out and buy some candy.

142 Q. Did you tell him anything else about where he should go and what he should do?

A. I never sent him any place.

Q. Did you tell him about staying around the block?

A. Yes, sir.

Q. What did you tell him?

A. I always told him he should stay around the block, and go no place else.

Q. Did you tell him that on this day?

A. Yes, sir.

Q. And did he go out from the house?

A. He went out from the house.

Q. What was the next that you heard of him?

A. The next came a boy and told me he fell down.

Q. Where did you go then?

A. I just run to the hospital.

Q. What hospital?

A. The Lincoln Hospital.

Q. And when you got to the Lincoln Hospital, did you find David?

A. I found David in the bed.

Q. Did David ever have anything the matter with his left arm before this accident?

A. Never.

Q. Before this day?

A. Never.

Q. Will you tell the jury about how long David remained in the hospital?

A. He was in the hospital quite a few months.

The Court: How many months?

The Witness: I can't remember.

Q. Try and think?

A. I think it is more than three months he was in the hospital.

Q. More than three months?

A. More than three months he was in the hospital.

Mr. Curtis: I think the doctor will be able to tell you that, sir.

143 Q. And do you know whether or not during the time he was in the hospital, he had any operations on his arm? Did the doctors do anything to his arm while he was there?

A. What can he do?

Mr. Curtis: All right. I will prove it by the doctor, your Honor.

Q. After he came back home, can you tell the Court and jury whether you saw any other marks on him, excepting the left arm?

A. He has got them on the right foot here (indicating), under the shin, and the bottom of the right foot, and the right hand.

Q. What did you see?

A. It was all burned out.

Q. How about the leg?

A. The leg was burned out like this, on the right foot.

Q. And are there marks there now?

A. Yes, sir.

Q. Did he ever have anything the matter with his right leg before?

A. Never.

Q. For how long after he came home did he complain of pain, if at all, in his right leg?

A. He complained for a year on his right leg, and used to limp on his right leg.

Q. For how long?

A. Well, for a year.

Q. And how long did he complain, if at all, about his right hand?

A. He complains now, too, sometimes.

Q. About what?

A. About his leg, when it is a rainy day.

Q. That is after he runs or does anything like that?

A. Yes.

Q. Did you know that he ever went to where this bridge was at all?

A. No, sir.

Q. You had no idea that he went there?

A. No.

144 Q. And you had no idea that he was going there that day?

A. No.

Q. After he came home, did David have any doctor?

A. Yes, sir.

Q. Doctor who?

A. Dr. Wallach.

Q. Where is his office?

A. His office was in Tiffany Street.

Q. Where?

A. His office was in Tiffany Street.

Q. Up in the Bronx?

A. Up in the Bronx.

Q. How long did he have Dr. Wallach?

A. He had him quite a few months.

Q. About how many months?

A. More than four months.

Q. After he came home?

A. After he came home.

Q. That is a different doctor than the one he had in the hospital?

A. Yes, sir.

The Court: Is he able to use his leg and his arm?

The Witness: He uses it for writing.

Q. Which arm?
A. The right arm.
Q. He has no left arm?
A. He ain't got no left arm.

The Court: Find out what money they expended on him.

Q. Can you tell the Court and jury with accuracy about how much money you spent for the doctor?
A. I used to pay him every second week.
Q. About how much money?
A. I cannot remember now.

Mr. Curtis: I think that is all.

145 Cross-examination.

By Mr. Carpenter:

Q. Will you tell us, Mrs. Fruchter, how near your house is, where you lived at that time, to this bridge that your boy went on? How near was your house to the bridge?

The Court: How far away from the bridge is the house?
The Witness: Maybe about five or eight blocks.

Q. What was the name of the street where you lived at that time?
A. Concord Avenue.
Q. You have been up to that bridge yourself?
A. No, sir.
Q. You have never been up to that bridge yourself?
A. No, sir.
Q. You never went near the bridge before the accident?
A. No, sir.
Q. And even after your boy was hurt, you never went near the bridge?
A. After he was hurt I went once.
Q. You went once?
A. Yes, sir.
Q. How soon after the accident was it that you went there?
A. The second day.
Q. Where you lived on Concord Avenue, were you familiar with the tracks, that ran underneath the bridge? Do you know that an electric road runs under there?
A. No, sir.
Q. Even now, you tell the Court and jury that you do not know that an electric railroad runs under the bridge?
A. No, sir.
Q. But you went there two days after the accident?
A. Yes, sir.
Q. And did you go on to the bridge?
A. I went on to the bridge.
Q. Did you look down and see the tracks under the bridge?

A. Under the bridge I saw tracks.
146 Q. Underneath the bridge you saw tracks?
A. Yes, sir.
Q. So you knew then that there was a railroad under there?

Mr. Curtis: That is objected to as utterly immaterial, as to what knowledge the witness had of the conditions subsequent, if she had no knowledge prior.
The Court: I guess that is correct.

Q. How long have you lived there within these few blocks of that bridge? How long before the accident have you lived within these few blocks of the bridge?
A. About a year and a half I lived there.
The Court: That means before the boy was hurt?
The Witness: Before the boy was hurt.
Q. And during the year and a half you had occasion to walk up there, into that open lot near the bridge, didn't you?
A. No, sir.
Q. You know that there are big open lots around the bridge?
A. I think not.
Q. What?
A. How can I know that?
Q. Even when you went there after the accident, you noticed it was all open country around there?
A. After I know it. Before I don't know it.
Q. You never heard the sounds of trains running on the tracks underneath that bridge before the accident?
A. How can I hear the trains?
Q. I am asking you did you hear them?

The Court: Did you hear them?
The Witness: No, I cannot.
The Court: Just answer the question.

Q. So you insist on it then, Mrs. Fruchter, that you did
147 not know there was any railroad there before the accident?
A. No, sir.
Q. And you lived there a year and a half?
A. A year and a half, and I don't know nothing about it.
Q. Going on a straight line from your house on Concord Avenue—taking a straight line with the railroad track, about how far would it be away?
A. I don't know.
Q. Where with respect to the—I withdraw that—Tell us about the train.
A. The trains goes sideways. If it goes straight, I go to 149th Street.
Q. How near to your house do these trains run?
A. Eight blocks.
Q. Your little boy used to go swimming down in the Sound, before the accident?
A. No, sir.

Q. Never?
A. Never.
Q. He never went in bathing with the other boys?
A. Never.
Q. You know where the boys used to go in bathing, down over that bridge?
A. I don't know before.
Q. Do you know now?
A. Now I know.
Q. But you never heard of your boy going in bathing in that place before the accident?
A. I never heard it.
Q. As I understand it, you told him to go out, with his eight cents, and buy some candy on the day of the accident?
A. I gave him two cents, he should go and buy candy.
Q. Two cents?
A. Yes, sir.
Q. Where was the candy store with reference to your house?
A. Next door to me.
Q. What time of day was this, Mrs. Fruchter, that you
148 gave him the two cents, and told him to go and get the candy?
A. It was before the evening.
Q. About what time?
A. I can't remember that.
Q. Had you had your supper yet?
A. No, sir, I did not have my supper yet.
Q. But it was some time in the afternoon?
A. It was just before the evening.
Q. You mean by that late in the afternoon?
A. Yes, sir.
Q. How long after you gave him that money was it that you heard he had been hurt?
A. About half an hour.
Q. And this was in June of 1916?
A. 1916.
Q. So it was daylight at that time when you heard about the accident?
A. Yes, sir.
Q. When you last saw him, and gave him that money, was he alone, or was he with somebody?
A. He went out alone from the house.
Q. Were you outside of the house yourself when you gave it to him?
A. I was in the house.
Q. And you did not pay any more attention to him after that?
A. He just went out.
Q. You paid no more attention to him after that?
A. I always paid attention to the children.
Q. What is that?

A. I always paid attention to the children, sure.
Q. Oh, you did?
A. Yes, sure.
Q. Did you see him after that playing around there at all?
A. I saw him in the hospital.
Q. I mean before the accident, and after you gave him the money, did you see him playing around there?
A. No, sir.

Q. So between the time you gave him the money, and the
149 time you heard about his accident, you did not see him at all?
A. I did not see him at all.

Q. All right. You never told him to keep off the bridge there in this neighborhood, before the accident?

Mr. Curtis: I object to that upon the ground that the witness has testified she knew nothing about any bridge before the accident.

The Court: That does not preclude him from inquiring on cross-examination.

Q. Did you ever tell your boy, before the accident, to keep off this bridge or bridges?
A. I don't know nothing about a bridge.
Q. Did you ever tell him that?
A. I just told him to keep off the bridge. He should not go no place.
Q. You told him to keep off the streets even?
A. Even from the streets.
Mr. Carpenter: That is all.

Redirect examination.

By Mr. Curtis:

Q. Mrs. Fruchter, just one question.
A. Yes, sir.
Q. Before this day, that David was hurt, did you ever know him before that to leave that block?
A. No.

Mr. Curtis: That is all.
Mr. Carpenter: That is all.

150 WILLIAM GOLL, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Curtis:

Q. What is your name?
A. William Goll.
Q. Mr. Goll, where do you live?
A. 4307 Richardson Avenue, Bronx.

Q. What is your business?
A. I am working for a brokerage firm now.
Q. In 1916, what was your business? You are now working as a messenger in a brokerage house?
A. Yes, sir.
Q. Down in Wall Street?
A. Yes ,sir.
Q. In 1916, what was your business?
A. A policeman of the Police Department in the City of New York.
Q. And you were assigned to what precinct?
A. It was then called the Sixty-first Precinct, now the Forty-fifth.
Q. Have you since retired on the completion of your twenty-six years of service?
A. Yes, sir.
Q. And you were retired at your own request?
A. Yes, sir.
Q. I want to ask you, Mr. Goll, whether you know the bridge at the foot of East 149th Street, in the Borough of the Bronx?
A. Yes, sir.
Q. Over the railroad tracks?
A. Yes, sir.
Q. And will you tell his Honor and the jury whether or not that bridge at any time was a portion of your post?
A. It was a portion of my post.
Q. You patrolled it?
A. I patrolled it.
Q. And you were an officer of the City of New York, and appointed to the Police Department?
A. Yes, sir.
151 Q. I show you a photograph (handing photograph to witness) and ask you whether you recognize it, and whether it is a fair representation of that bridge in June of 1916?
A. Yes, sir.

Mr. Curtis: I offer that in evidence.
Mr. Carpenter: No objection.
The Court: Mark it.

Photograph received in evidence and marked Plaintiff's Exhibit 1.

Q. I want to call your attention to the posts above the bridge itself. Apparently, there are two square boards on them?
A. Yes, sir.
Q. Two uprights?
A. Yes, sir.
Q. I want to ask you whether those boards were there in 1916?
A. They were not there the night of that accident.
Q. They were not there prior to that accident?
A. No, sir.

Mr. Curtis: This picture is taken some time since, your Honor. May I show it to the jury?

The Court: Yes.
Mr. Carpenter: Can I see which ones he indicated?

Q. I show you another photograph and ask you if that is a fair representation of the bridge and the general surroundings?
A. What is this, the north side of it?
Q. I don't know, and I don't care. Is that a fair representation of the bridge and the general surroundings?
A. Yes, sir.

Mr. Curtis: I offer that in evidence.
Mr. Carpenter: No objection.

Photograph received in evidence and marked Plaintiff's Exhibit 2. (Exhibit 2 shown to the Court.)

152 Q. Mr. Goll, I draw your attention particularly on Plaintiff's Exhibit No. 1 to this trellis work along the different girders. Do you see that?
A. Yes, sir.
Q. Was that there in June of 1916?
A. Yes, sir.
Q. And before that?
A. Yes, sir, before that.
Q. I note that on these large girders there are three in this picture. Did they incline in that way?
A. Yes, sir, at an angle of about 45 degrees, I should judge.
Q. And in these inclined girders, were there any bolt heads?
A. Rivet heads.
Q. About how large around would you say they were?
A. I should judge they were about an inch and a quarter to an inch and a half. The heads were all about that big (indicating).
Q. What diameter is that, Mr. Goll?
A. I should say about that big (indicating).

Mr. Carpenter: Mr. Foreman, what do you say?
The Foreman: I should say about 2 inches.
Mr. Carpenter: Indicating about 2 inches in dimaeter.

Q. How far up from the girder itself did they protrude?
A. About an inch.
Q. How much?
A. About an inch. Probably a little more.
Q. In June of 1916, and prior thereto, were there wires similar to those that we see in Plaintiff's Exhibit No. 1, stretched across the top of this bridge?
A. Yes, sir.
Q. And there were arms or metal supports, such as we see above the top of the bridge at that time?
A. Yes, sir.
153 Q. And before that time?
A. And before that time.
Q. Directing your attention to Exhibit No. 2, were these railroad

tracks or tracks similar to them, in that location and of that number there in June of 1916 and prior thereto?

A. Yes, sir, there were.

Q. Were there railroad trains operated there at that time?

A. Yes, sir.

Q. For both freight and passengers?

A. For both freight and passengers, yes, sir.

Q. And were there trains of any kind stored there, or stopped there in that neighborhood?

A. There is a yard there.

Q. What kind of a yard?

A. The Oak Point freight yard, above this bridge. A large yard where cars were stored there, to load and unload, I presume.

Q. About how many months or years were you on post as a police officer on that post, in which this bridge is?

A. Well, off and on, about four years. Of course, I did not have the same post all the time. Sometimes the posts are doubled up. Up here on that day I was doubled up on two posts there.

Q. But you say you had that post for four years?

A. Yes, sir.

Q. Were this bridge and the tracks and wires in that general condition as I have drawn your attention to for that four years before the accident?

A. Yes, sir.

Q. I want to ask you, while you were on duty there, in the course of your patrol, covering four years, you saw railroad men and employees in and around and on that bridge?

A. Under the bridge and over the bridge.

154 Q. As a matter of fact, is there any stairway that leads from this bridge down into the railroad yard?

A. There is a stairway below the bridge, east of the bridge, or a runway, where the men come up and down from their work on the railroad.

Q. About how far from the bridge?

A. I should judge about the block further on of the bridge, east.

The Court: That is a stairway that leads from the railroad tracks up to the bridge?

The Witness: No, it leads up to the street.

The Court: From the railroad tracks?

The Witness: Yes, sir.

The Court: I understand from that representation there, that the railroad tracks are below the bridge?

The Witness: Yes, sir, under the bridge.

The Court: The stairway leads from where to where?

The Witness: From the bridge.

Q. On one end of it, the steps lead to the tracks?

A. Yes, sir.

Q. And the other end of it comes up on the street?

A. Yes, sir. There is an embankment here from the tracks up to here (indicating).

Q. And the point where it comes up on the street is about how far from that bridge structure itself?

A. I should judge about a block.

Q. And that stairway was in constant use by railroad men, was it, and you have seen them on the bridge, and over the bridge and under the bridge?

A. I have.

Q. During the four years that you included this bridge in
155 your post, did you see any children climbing around this bridge structure?

A. I did.

Q. And on top of the bridge, climbing up on the bridge structure?

A. I did.

Q. On how many occasions?

A. Ch yes, quite often.

Q. And covering a time of how many years before this accident?

A. About two years.

Q. And did you notice at any time how they climbed up on that bridge? How they got up there?

A. Yes.

Q. How?

A. I have seen them climb up in the center of the bridge off this lattice work like. I have seen them climb up on this here slide, see?

Q. When you speak of the slide, you mean those inclined girders, where the rivet heads are?

A. Right. They are about 18 inches wide, and children used that for a slide, and they go up a certain distance, and then turn around and sit down, and slide down then.

Q. On the bolt heads and everything else?

A. Well, they are on the side.

Q. You have seen them climb up there on the sides, and up on the bridge?

A. Yes.

Q. Now as to the question of—did you ever see any railroad men on guard or on watch on that bridge?

A. Never.

Q. Did you ever see any red flags or red lights or anything of that kind around the girders of the bridge or on top of the bridge?

A. No, sir.

Q. As to the question of signs, were there any signs on the bridge anywhere, and if so, where?

A. Yes, there were signs on the bridge.

Q. Where?

A. There is a footpath on this side of the bridge here (indicating) and over the wires, which this photograph shows.

156 Q. Those wires under the bridge?

A. Under the bridge. There are large signs, at the sides, stating that these are live wires, danger, or something similar to that.

Juror No. 7: That is under the bridge?

The Witness: No, not under the bridge.

Juror No. 7: Where was this sign?

The Witness: On the footpath here (indicating).

Juror No. 7: Is that the footpath?

The Witness: This is a footpath.

Q. Were there signs on the footpath at the bottom or top of the bridge?

A. They were on the footpath, on this railing here, this guard rail here (indicating).

Q. Were they just over, just on top of the wires that went under the bridge?

A. Yes.

Q. The wires right under the bridge?

A. The wires right under the bridge.

Q. These danger signs that you speak of, were just over and on top of where those wires ran?

A. Yes.

Q. Were there any signs on the top of the bridge where these other wires were at that time?

A. No.

Q. Do you know where 630 Concord Avenue is, or about where it is?

A. It is about 141st Street. That is, above 149th Street, 630. I was thinking of 330. 630 is above 149th Street.

Q. And you know about, as near as you can estimate it, about how far it is from the bridge?

A. I should judge that that is about half a mile. May be a little more.

Q. I am informed that that number is at 152d Street.
157 How far would Concord Avenue and 152d Street be from the head of this bridge?

A. About three quarters of a mile.

Q. This neighborhood, within a couple of blocks of this bridge, will you tell this jury whether it is sparsely settled, or whether it is a tenement district, and very heavily populated?

A. It is a tenement district, and it is on the Boulevard. There is a lot of tenement houses there, quite a number of them.

Q. And in that vicinity are there many people?

A. Oh, yes, there is quite a few people living in those houses, with children, and in all tenement houses you find that condition. Also, there are tenement houses to the east of the Boulevard.

Mr. Curtis: That is all, sir.

Cross-examination of William Goll.

By Mr. Carpenter:

Q. Is this bridge east of the Southern Boulevard or west of it?

A. The bridge is east of the Southern Boulevard.

Q. It is between the Southern Boulevard and the Sound, is it?

A. Yes. The East River, or the Sound, whatever you call it.

Q. This land that is immediately adjacent to the bridge, is not built up, is it?

A. No.

Q. It is all open rolling country there?

A. Yes, sir.
Q. Isn't it.
A. East of Austin Place it is.
Q. For a distance of several blocks, for a radius of several blocks from the center of that bridge, it is all open rolling country, isn't it?
A. East of the bridge, yes. With freight yards, tracks, and things of that kind there.

Q. I am referring to the fact that there are no residences
158 around there for several blocks, on a line drawn from the center of that bridge?

A. Oh, yes.
Q. And in every direction it is practically open country around there, isn't it?
A. Well, it is. There are vacant lots around there, but there is quite a residence section west of the bridge.
Q. Where this roadway approaches the bridge, after you get away from the station, as the roadway approaches the bridge, it isn't any better, is it? It is not even paved, is it?
A. No, it is not a paved street.
Q. It was not paved in 1916, was it?
A. No, nor it is not paved today.
Q. And today it is less built up than it was in 1916 there, isn't it? Or isn't it far more built up today around that bridge than it was in 1916?

Mr. Curtis: What is the question, that it was less or that it was far more?
The Witness: I have not seen any houses around there, and I was there last Sunday a week ago, looking at this place.

Q. As it stands, when you were there a week ago, there were probably the same buildings there, so far as the residential section goes, there were practically the same buildings there in 1916, or was it not so much built up?
A. I did not walk around the neighborhood to see.

The Court: Say you don't know, that answers the whole thing.
Q. Wasn't it built up in 1916 as it was when you went there two weeks ago?
A. I don't know that.
Q. How long were you on the beat around about that place in 1916?

A. I should judge I was about two years around there.
159 Q. Two years?
A. Around that time.

Q. You tell the Court and jury then that you don't know whether it was built up in 1916 as it is now, when you were out there two weeks ago?
A. It did not seem to me that there was any change in the neighborhood at all.
Q. This roadway that runs over the bridge, it is a rough, unfinished, dirt, country road?

A. That runs over the bridge?
Q. Yes, that approaches the bridge?
A. Yes.
Q. On either side?
A. On either side.
Q. And the land on each side of the roadway as it approaches the bridge, is not built up, is it
A. No, south and north of the bridge, that is the railroad tracks.
Q. What precinct did you report to in 1916?
A. The Sixty-first Precinct.
Q. How long had you been reporting to that precinct?
A. Until I retired.
Q. How long was it that you reported there to that precinct?
A. How many years I served in that precinct?
Q. Yes.
A. That I could not tell you. I was off and on in the precinct five different times. I went there when the precinct opened, about twenty-three years ago.
Q. Were you reporting to that precinct in December of 1916?
A. I was.
Q. Were you on duty on the day of this accident?
A. I was.
Q. Were you on duty at the time of the accident?
A. Yes, sir.
Q. Did you hear about it?
A. Yes, sir.
Q. Did you go up there?
A. I went up there, yes, sir.
160 Q. And after the accident did you continue to patrol that same section for some time after that?
A. Yes, for some time after that.
Q. How long after were you constantly patrolling that region in that section after this accident?
A. Well, I couldn't say that.
Q. About?
A. I should judge, on and off, about two years after that.
Q. But all through June, anyway, you were patrolling in the same department, all through June and July, were you?
A. Part of it.
Q. So you had occasion, during June and July, after this accident, to go there to that bridge?
A. Yes.
Q. And you kept doing that for months and years afterwards, as I understand it, patrolling that bridge?
A. Well, for the two years after the accident about, I should judge.
Q. Now tell the Court and jury when it was—I withdraw it—When you were up there, two weeks ago, to the scene of the accident, did you see any signs on that bridge, above the bridge, on the top part of it?
A. I did.

Q. Now, when, in the course of your patrol did you first see those signs there?

The Court: When you went back there, two weeks ago, is that the first time you saw them?

The Witness: No, *there* were there after this accident occurred. There were signs on the bridge.

Q. When did you first see them after this accident occurred?

The Court: About when?

The Witness: Why, in about a week. I was covering two
161 posts. Probably I did not get in that vicinity again for a week, and may be it was a month. That I couldn't say, but I know that the signs were placed there after this accident occurred, but I could not state how long, and after that I cannot exactly say when the signs were placed there, because when we were short of men, they doubled up.

Q. You tell the Court and jury that you know that those signs on the top of that bridge were put there after this accident?

A. I do, yes.

Q. Did you make a note of this, a report of it?

A. I did not.

Q. Did you report this accident?

A. I did.

Q. Did you make any report after the signs were put up, that those signs were put there?

A. No.

Q. As an officer of the law, you made no report?

A. I made no report.

Q. That those signs were not there at the time of the accident?

Mr. Curtis: We object to it upon the ground that it assumes he was under some obligation to report with regard to signs, which is absolutely without foundation

The Court: Unless there is some ordinance or some such rule.

Mr. Curtis: There is no such ordinance or rule.

The Witness: I never made a report.

The Court: Do not let us take so much time in going into these things.

Mr. Carpenter: Does your Honor mean that I am not conducting this examination properly?

The Court: No. I am just putting you on notice that you
162 should not go into reasons for something that is not required by law. You can take an exception if you desire.

Mr. Carpenter: Exception.

Q. Do I understand that at the time in question, that you felt that this railroad was at fault in not having these signs there?

Mr. Curtis: That is objected to.

The Court: Objection sustained. I do not want any reasons or any argument from this witness.

Q. When did you first make this statement which you have made here today, that there were no signs on this bridge such as you have described, on the upper part of the bridge, stating that there were live wires there. When did you first make this statement?

The Court: Do you recollect? If you do not know, say you don't know.

The Witness: I don't know.

Q. Did you discuss it with anybody?
A. I did, yes.
Q. When?
A. Two weeks ago.
Q. That is the first time?
A. That is the first time.
Q. So from the time of the accident in 1916, down to date, until two weeks ago, you never discussed its feature, about the lack of those signs, is that right?
A. That is right.
Q. And as a police officer you saw many accidents, I suppose?
A. Yes, sir.
Q. And made many reports?
A. Yes, sir.
Q. And you have testified in many cases?
A. I did.

163 Mr. Curtis: I object to that.

The Court: Objection sustained.

Mr. Carpenter: Exception.

Q. How do you recall that it was about two weeks after this accident that the signs were there?

Mr. Curtis: I object to it. He never said any such thing.

Mr. Carpenter: I understood him to say so.

The Court: No, he says he discovered signs there after the accident. I do not recall that he said any particular time.

Q. Didn't you say you saw them about two weeks afterward?
A. I did not.
Q. Didn't you say it right here?
A. I did not.
Q. I will ask you the question then.
A. What I did say, was to the best of my recollection it was two weeks, but I would not say two weeks.
Q. I thought you said it. The best of your recollection is that it was two weeks?
A. Yes, sir.
Q. Why is it that you recall that date. Tell this Court and jury what event fixes that time in your mind, as being about the time that those signs were put there?
A. Because there was an accident occurred there, and every time I passed that bridge, I thought of this bridge, and thought of this

accident, and I always looked to see if it was properly guarded against another accident of the same kind.

Q. Do you tell the Court and jury that another boy or some other accident occurred, and that another boy was burned on that bridge?

A. There was a boy, one time. The one boy. I did not say
164 he was burned on that bridge, but there was a boy burned on the wires that went under the bridge.

Q. What accident are you referring to now, when you say that there was an accident that caused this to come to your mind?

A. I did not have the case. That is the reason I do not remember the particulars of the case, but I remember the time. A boy climbed over the railing, the guard railing, a little higher up, and he must have fallen on these wires.

The Court: Counsel asked you about the signs that were put up on the top wires, and what caused you to look and remember about it. How did you come to note the fact that the sign was put up on the top wires? Not in those lower wires, because that refers to a collateral issue, and has nothing to do with this case.

The Witness: Seeing that this accident had occurred, of course I took particular notice to see if there were proper precautions taken so as there wouldn't be another accident of that kind.

The Court: You are speaking of the accident to the Fruchter boy?

The Witness: Yes, sir.

Q. You had nothing to do with this accident to the other boy, down under the bridge? You made no report of it, and had nothing to do with it?

Mr. Curtis: I object to it.

The Court: Objection sustained. We are not going into the trial of that case at this time.

Mr. Carpenter: I am not going into that, your Honor, and I take an exception.

Q. So I understand that that other accident, with that other boy, has nothing to do with this.

165 Q. Have you refreshed your recollection as to when these signs were put up there for the first time?

A. No.

Q. It is not refreshed?

A. No.

Q. So that when you said a moment ago that the reason you knew it was about two weeks, because of an accident, which accident did you refer to?

Mr. Curtis: I object to that as already answered.

The Court: Objection sustained.

Mr. Carpenter: Except*oin*.

The Court: I am going to see that this case is conducted with some expedition, or else we will know it.

Mr. Carpenter: Now, if your Honor pleases, I contend——

The Court: I do not see the necessity of going into all these collateral matters, unless it is to test the credibility of the witness.

Mr. Carpenter: We are trying to test his credibility on the question as to when——

The Court: Do it with pertinence, and with a proper question.

Mr. Carpenter: I submit, if the Court please, that that is not a proper criticism.

The Court: The Court is the proper one to submit it to. I will conduct the trial, and if other Judges would do the same thing, there would not be these cases going on here for four or five years, without getting to trial.

Mr. Carpenter: I must except to that, your Honor.

The Court: Very well.

166 Mr. Carpenter: I say it is not fair to my client or to myself, under these circumstances.

The Court: Very well. Take it down.

Q. Now, when you saw these boys playing up there on the bridge, what did you do?

A. Well, when they saw me——

Q. What did you do?

A. What did I do?

Q. Yes.

A. I went down towards the bridge, and just as the boys would see me around, they would rush down the railroad track.

Q. Had you ever chased them off?

A. Myself?

Q. Yes.

A. I could not get near enough to them. Just as soon as they would see me, they would go away.

Q. As soon as they saw you coming they ran, is that right?

A. Yes.

Q. At any of these times when they saw you coming and they ran, were they up on the bridge? I mean, up above the roadway?

A. They were.

Q. About how many times before this accident?

A. Well, that I couldn't say. Several times I have chased them off of that structure.

Q. You mean by that, three or four times, something like that?

A. I could say a dozen times.

The Court: Well now, he said——

Mr. Carpenter: I want to get it about, that is all.

Q. Do I understand you to state postively that at no time in June of 1916 there were any signs—I will ask you that question—At any time during June of 1916, were there any signs on the superstructure of that bridge containing the words "Live Wires. Keep Off. Danger," or something like that?

167 Mr. Curtis: That is objected to as already answered.

The Court: Yes. He said after this accident he had seen the signs, but not before. Is not that your statement?

The Witness: After the accident the signs were on the roadway.
The Court: We are not going into that.
Mr. Curtis: The top signs?
The Witness: No.

Q. You say they were not there at any time during June, 1916?

The Court: He has answered that.
Mr. Curtis: He said it might have been two weeks afterwards.
The Court: This accident was charged to have occurred in July?
Mr. Carpenter: June 6th.
The Court: Let him answer it, and we will get through with it in a shorter time.

Q. You say that at no time in June of 1916 were there any signs on the superstructure of this bridge pertaining to wires?
A. I answered about two weeks afterwards, and if it happened on June 7th, it must have been that the signs were put on the bridge.
Q. Had you ever seen the boys actually going up this lattice work?
A. Yes, the Sunday before last I seen two of them on it.
Q. Had you ever seen them, after they got up on top of the bridge, go up on top of the superstructure, and climb that? Have you ever seen them do that? Do you know what I mean by the superstructure?
A. The structure overhead.
Q. No, the upper part. The part that holds the wires?
A. Yes.
168 Q. I am asking you, had you ever seen the boys, after they got up on the top of the bridge, climb the superstructure, which holds the wires?
A. No, I have not seen them up on that.

The Court: It is not incumbent upon you, and you are not required to enter into any explanations, or into any arguments, unless your answer has to be so framed, but just answer what you know and what you saw, and then we will get along. When you go on to argue with your counsel, that prolongs this examination.

Q. In 1916, before this accident, were there two signs on the roadway of the bridge, at the other end of the bridge, shown in Plaintiff's Exhibit No. 1? At the other end, the far end, looking into that picture?
A. On the top of the structure?
Q. No, on the roadway, where the passengers go, the pedestrians?
A. Yes, there were two signs there, on that footpath, for pedestrians, the railing between the structure here, and where pedestrians walk between.
Q. I am talking now, Mr. Officer, about the far side of that bridge. Of course, there are two signs showing in the picture, but at the far side of the bridge, at the back of that picture, were there two signs there on the pedestrians' roadway, in 1916, before this accident?

Mr. Curtis: We object to the question as having nothing to do with it, and as away from the point of this accident entirely.

Q. At the other end of the bridge?

The Court: There is nothing in the direct-examination that calls for that.

Mr. Carpenter: May I make him my own witness on that point?

169 The Court: You may, by calling him at the proper time. Cross-examination is confined strictly to the direct-examination.

Q. When you refer, Mr. Officer, to signs being in the pedestrians' roadway, on either side of the bridge, do you mean that there were just two signs, or that there were four signs there in 1916, before the accident happened?

A. The center of this bridge is the dividing line of the precinct.

The Court: Do not go into all that argument about the dividing line.

The Witness: I did not *control* the other side of the bridge. I did not see that.

Q. Do you mean to say that you did not patrol over that bridge at all?

A. I did, on the south side.

Q. But you went clear across the bridge, didn't you, in 1916?

A. Yes, sir.

Q. I am asking you, when you went clear across the bridge in 1916, were there two signs on the other end of the bridge, similar to those two signs in Plaintiff's Exhibit No. 1?

Mr. Curtis: That we object to, on the ground that it is not proper cross-examination, and furthermore, on the ground that the other end of the bridge has nothing to do with the point of this accident.

The Court: He is testing his recollection.

The Witness: I don't know whether there were signs on the other end of the bridge. There were no signs——

Q. This trellis work which you have referred to, Mr. Officer, is that any different from the trellis work which you see on any steel bridge?

170 Mr. Curtis: We object. It is not shown that this witness knows anything about any other bridges.

Q. I will ask you first, as an officer, patrolling about the city, have you seen any other steel bridges in this city?

A. I have seen a number of them.

Q. Was the trellis work on this bridge any different from the trellis work on any other bridges?

A. I never paid any particular attention to the trellis work on any other bridge.

Q. Were those iron rivets which you have described to the Court

and jury, were those different from any other rivets that you had seen on any other bridge?

A. No, they are not.

Q. And were the iron girders of the incline you described different from the iron girders and inclines you have seen on any other bridge?

A. Certainly.

Q. In what respect do they differ?

A. Some of them came out, and turned around—take for instance——

The Court: Do not go into that.

Q. But they are all inclined, aren't they?

Mr. Curtis: We object to it.

The Court: I sustain the objection. Other bridges have nothing to do with this.

Mr. Carpenter: I take an exception. That is all.

Redirect examination.

By Mr. Curtis:

Q. Is the middle of this bridge that we have been talking about here, the dividing line between the two parts?

A. The center, yes, sir.

Q. And it was at this end of the bridge where the accident happened?

A. Yes, sir.

171 Q. That was your post?

A. Yes, sir.

Q. And the other end of the bridge belonged to another officer?

A. It belonged to another precinct.

Q. With regard to the immediate locality, the north side of the bridge, and so forth, those are the railroad yards?

A. Yes, sir.

Q. And on the east it is not built up?

A. No, sir.

Q. And on the west, how far do you go before you find lots of houses?

A. 300 feet.

Q. And then you find blocks of tenement houses, is that right?

A. Yes, sir.

Q. You were asked by the attorney for the railroad company when you first talked about these signs, and you told him about two weeks ago, is that right?

A. Yes, sir.

Q. Who was it that came to you, and you talked to about these signs? How was it, who asked you about them, and from where did he come? Where did the man come from that asked you about the signs two weeks ago?

A. He came from the railroad.

Q. Did he subpœna you afterwards?
A. No, sir.

Mr. Curtis: That is all.

By Mr. Carpenter:

Q. Had you been subpœnaed before that time by the plaintiff?
A. About five minutes after?
Q. No, before that?
A. Yes.

Mr. Carpenter: All right.
Mr. Curtis: That is all.

172 HOGE GILLIAM, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Curtis:

Q. What is your name?
A. Hoge Gilliam.
Q. Mr. Gilliam, where do you live?
A. Riverside, Connecticut.
Q. What is your business?
A. Electrical engineer.
Q. For whom?
A. For the New York, New Haven & Hartford Railroad.
Q. How long have you been employed by them?
A. September 7th, 1907.
Q. And you are still in their employ?
A. Yes, sir.
Q. I show you Plaintiff's Exhibit No. 1. Do you know that bridge?
A. I do.
Q. Is that one of the bridges of the New York, New Haven & Hartford Railroad Company?
A. It is one of the bridges that cross the track of the New York, New Haven & Hartford Railroad Company.
Q. You don't know whether they built it or not, so I won't bother you?
A. I don't know whether it is a city bridge.
Q. I did not ask you that, sir. I know you are willing to answer?
A. Anything I know.
Q. I know it. Do you see some wires over that bridge?
A. Do I see some?
Q. Yes.
A. There are some wires over that bridge.
Q. Do you see them in Plaintiff's Exhibit 1. Take a long look. Now, do not argue with me?

A. I see the bridge.

173 Q. Were there any wires across the top of that bridge in a similar position, in 1916?

A. There were.

Q. How many sets of them?

A. Beg pardon?

Q. How many sets of them, or how many wires? May I ask you what you are reading from?

A. I am referring to my notes.

Q. Made when?

A. Made when?

Q. Yes.

A. I won't refer to the notes at all. I will refer to my memory.

Q. When did you make those notes?

A. I did not make these notes.

The Court: He is not depending on the notes.

Q. How many sets of wires were there there, Mr. Gilliam?

A. On one side there was——

Q. Just a minute. I want to find out which side. On the south side?

A. On the south side there were six wires.

Q. I am only referring to the superstructure?

A. On the top, running at right angles to the bridge.

Q. At that time——

Mr. Carpenter: Does this refer to 1916?

Mr. Curtis: Oh, yes.

Q. You understand me?

A. Yes, sir.

Q. How were they strung across on top of that bridge?

A. They were supported on porcelain insulators.

Q. On what were they strung, on arms or what?

A. No. I am telling you they were supported on porcelain insulators.

Q. What are these arms that we see on top of that bridge (indicating)? What do you call those metal arms?

A. We call those cross arms.

174 Q. And the wires run from one of these cross arms to the other, don't they?

A. No, sir.

Q. All right. How were they arranged? Were they all on a level, or were there two above two, and then two above that? In 1916?

A. In 1916, there was two above two, and two above one. There were seven wires on that bridge.

Q. Two above two, and then one and then two?

A. Two above one.

Q. There were seven wires?

A. Yes.

Q. First two?

A. Yes.
Q. Then two?
A. Yes.
Q. And then two more?
A. Then two.
Q. Making four?
A. I won't state positively, whether there were two above one or one was above two.
Q. Have you any memorandum by which you could refresh your memory on that?
A. Yes.
Q. Please look at that. At the south end of the bridge.
A. At the south end?
Q. Yes.
A. On the south side there is a cross arm, which is a steel structure, on which are mounted two cross arms, and on the bottom cross arm there are three wires.
Q. Were those three wires on practically a level?
A. Yes, sir, parallel.
Q. Then what?
A. And above that there was a cross arm with two wires which were parallel.
Q. They were practically on a level with each other?
A. Yes, sir.
Q. About how high above the first three that you first mentioned were these two?
A. Do you mean the distance between the two sets of wires?
Q. Between the three and the two?
A. About 4 feet and 6 inches.
175 Q. And then comes two more, I suppose, making the seven?
A. If you will just look at this diagram a minute.
Q. First there are three?
A. Yes.
Q. And then there are two?
A. Yes, sir.
Q. Four feet and six inches above the first three?
A. Yes, sir.
Q. And then above those were two more?
A. No, there was a ground wire above that.
Q. What is a ground wire?
A. That is a wire strung from one steel structure to the other. That was the six wires that I had mentioned.
Q. Is there any current in a ground wire?
A. No, sir.
Q. So that there were six wires there, and not seven?
A. That there were those wires there I am not sure, as I originally stated.
Q. First there is a series of three, parallel?
A. Yes, sir, parallel.
Q. And they were about how far above the top of the bridge?

A. 5 feet 11¾ inches.
Q. Above the top of the bridge?
A. The steel girder.

The Court: Are you basing the ground of your suit upon the improper stringing of those wires, or upon their improper installation, or their defective insulation?
Mr. Curtis: And improper guards also.
The Court: Then why should you continue to discuss the distance between those wires, and how many wires there were, and exactly where they went up?
Mr. Curtis: I will ask him about two questions, and then I am through, sir.

The Court: It may be material, but all the jury wants to
176 know, and all the Court wants to know, is whether or not these wires were exposed and neglected, and whether one or the other of the wires came in contact with the boy.

Q. What were the series of three wires used for?
A. Two wires—one wire was used for a feeder, to supply current for the propulsion of electric trains.
Q. Which one was that of the three?
A. That is the extreme left.
Q. Was that nearest the south?
A. No, that is furthest from the south.
Q. What were the others?
A. The next one to that, paralleling that, was a wire used for operating circuit breakers. The third wire from that, on the same plane, was a feeder, used for operating—furnishing current for operating the lights.
Q. And were these three wires what are called live wires?
A. With the exception of the middle one, that at times might be dead.
Q. The others were alive?
A. Practically.
Q. And they were used for the operation of the lights on the bridge?
A. No, lights along the station.
Q. On what railroad?
A. The New York, New Haven & Hartford Railroad.
Q. And both outside wires were used for the same purpose?
A. No, the feeder wire was used to supply propulsion current for the trains.
Q. Which trains?
A. The trains that run on the New York, New Haven & Hartford Railroad.
Q. And the middle wire is what you call the feeder, which sometimes may be dead?

A. No, the middle wire we call the patrol wire.
177 Q. The two outside wires, one was for the propulsion of power for the trains, and the other furnished light for the stations?

A. Yes, sir.

Q. That is all. One moment. I show you this photograph, Plaintiff's Exhibit No. 1. As you look at this bridge, which end of the bridge is that, north or south, as you term it?

A. I term that the north side.

Q. You would?

A. This is on the north side of the bridge, looking south.

Q. Then in your testimony as to the south side, you meant the north side?

A. Yes, sir.

Q. How many wires were there on that side of the bridge?

Mr. Carpenter: Which one is he referring to now?

Mr. Curtis: The north side.

The Court: Did the same conditions obtain as to the other side?

The Witness: With the exception of one more wire.

Q. Show us the difference?

A. Instead of having three wires on the bottom plane, there are four, and two on the top.

Q. Number them. Which ones are live, first.

A. All three of them, or three of the four on the bottom plane are live, with the exception of the one next to the pole.

Q. Next to the pole, is that nearest to the bridge?

A. On the cross arms, next to the upright support.

Q. A person who is climbing up the front of that bridge, nearest the pole, if he came up the front of that bridge, is the wire that is dead nearest the end of the bridge, or is it furthest in?

A. It would be the second wire in.

178 Q. The first wire that you meet would be what wire?

A. The first wire you would meet would be a three-phase wire. That is, a power wire.

Q. A live wire?

A. All supposed to be live.

Q. What was that wire used for?

A. For furnishing propulsion current to operate the trains and so forth at the bridge.

Q. On what railroad?

A. On the New York, New Haven & Hartford Railroad.

Q. The first wire, or the first set of four wires, the nearest one to the end of the bridge, was the first one you would meet?

A. Yes, sir.

Mr. Curtis: That is all.

Cross-examination.

By Mr. Carpenter:

Q. By your reference to the north side of that bridge, which side of that bridge do you refer to in Plaintiff's Exhibit No. 1?

A. The north side, as we call it, would be this side (indicating).

The Court: Make a cross there.

The Witness: (After marking as requested.) That is the side next to New York, away from the river. We figure the north side of the railroad as one side, and the south side as the other. This end of it, the whole end, we call the north, and the whole other side we call the south.

Q. So when you refer to the wires on the south side, you mean the wires in the middle of the bridge?

A. Well, practically. They are not shown.

Q. Will you tell us what the distance is from the last of the four lowest wires on the north side, the distance from there to the top of the bridge? That is, how far the bottom wires of the north side are above the top of the bridge?

179 A. On the north side it is 6 feet 6 inches from the top of the floor of the bridge to the bottom of the wire.

Q. That is all. One other question, Mr. Gilliam. How far is the nearest bottom wire on the north side from the upright on the superstructure, from the bonnet, I guess you call it, don't you?

A. Yes, the bonnet. On the north side, the two wires adjacent to the bonnet, go up the same distance, 19½ inches.

Q. So that anyone going up the trellis work of the bonnet, would have to reach out, in order to touch the wire, 19½ inches, is that right?

A. The space from the steel upright to the wire is 19½ inches.

Mr. Carpenter: That is all.

By Mr. Curtis:

Q. The nearest wire is 6 feet above the girder of the bridge?

A. The bottom plane of the wires, to the floor of the bridge, is 6 feet and 6 inches. That is, on the north side, and I am speaking about the north side.

Q. You said that was the north side of the bridge there, when you looked at it?

A. Yes.

Q. Well, that is where the accident happened?

A. I don't know that.

Mr. Curtis: That is all.

JOSEPH ATRAZZO, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Curtis:

Q. What is your name?

A. Joseph Atrazzo.

Q. Joseph, where do you live?

A. 626 Concord Avenue.

180 Q. And do you work now, Joseph?

A. Yes, sir.

Q. At what?
A. At Collier's. Feeding machines.
Q. That is a magazine?
A. A magazine, yes, sir.
Q. In 1916 were you working anywhere, or were you just a little school boy?
A. I was going to school.
Q. How old are you now, Joseph?
A. Fourteen years old.
Q. In 1916, you say you were going to school?
A. I was going to school, yes, sir.
Q. Did you hear about little David being hurt?
A. Yes, sir.
Q. And do you know this bridge shown in Plaintiff's Exhibit No. 1 (handing photograph to witness)?
A. Yes, sir.
Q. Before David was hurt, did you ever go on that bridge?
A. Yes, sir.
Q. And did you ever climb up on that bridge?
A. Yes, sir.
Q. For how many years, at different times, did you use to climb up on the bridge?
A. Before the accident?
Q. Yes.
A. A year before the accident.
Q. You climbed up there a year before?
A. A year before the accident.
Q. Did you climb up there some time before the accident?
A. Yes, sir.
Q. And did these other boys climb up there with you?
A. Yes, sir.
Q. What were you climbing up on the bridge for?
A. There was birds' nests up there. To get the eggs, and we went up to play tag.
Q. Did you climb around the different parts of the bridge playing up there?
A. Yes, sir.
181 Q. Tell the jury whether there were any railroad tracks or freight yards near there?
A. There were.
Q. Where were they?
A. Right underneath the bridge.
Q. Where were the yards for the freight cars?
A. Underneath the bridge.
Q. Did anybody ever chase you off the bridge?
A. No, sir.
Q. Did anybody ever tell you not to go on the bridge?
A. No, sir.
Q. At any time when you were climbing up on this bridge, did you ever see any men down on the tracks in the railroad yard?
A. Yes, sir.

Q. How were they dressed?
A. They had overalls on, some kind of white blouses on, not white, but blue. All dirty and smeared with grease.
Q. They were working around the yard?
A. They were working around the yard.
Q. You have seen them there in the day time when you and the boys were climbing up on the trellis work?
A. Yes, sir, on the bridge.
Q. Where was the bird's nest? Can you show us?

The Court: Do you recognize that picture?
The Witness. Yes, sir.
The Court: What is it?
The Witness: That is the bridge that goes over the tracks of the New York, New Haven & Hartford Railroad.

(The bird's nest was marked on the photograph by the witness, and the picture shown to the jury.)

Q. When you went up on the structure, how did you get up?
A. Something like a ladder.
Q. What?
A. I climbed up the ladder.
Q. You mean where that open work is?
A. Yes.
Q. You call that a ladder?
A. Yes, sir, a ladder.

Mr. Curtis: That is all, sir.

Cross-examination of Joseph Atrazzo.

By Mr. Carpenter:

Q. I want you to tell the Court and jury how you got up on the top of the bridge, after you reached the top part of the lattice work?
A. Climbed up the iron structure, to get on top, and walked along, until I got on the flat side of the bridge.
Q. How did you reach from the top of the lattice work, to the top of the girder, which was on the top of the bridge?
A. Climbed up there.
Q. The lattice work did not run out even at the top of the top of the girder?
A. No, sir. I climbed along the side, where the rivets are, and I climbed up, and I put my legs around, pretty easy, up to the top, and when I got on the flat side of the iron, I stood up there and began walking around.
Q. So, as I understand you, in climbing up, when you would go up to the end of the lattice work, you would use these sides of the iron?
A. The sides of the iron, yes, sir. I put two legs on each side of the iron, and my two hands on the other side and climbed up.
Q. So you are now referring to the inclined girder, are you?

When you speak of having your feet on the outside, and your hands on the inside are you referring to the inclined girder?

A. The outside.

183 Q. But you are referring to the inclined one, aren't you? You are referring to that?

A. I don't know that.

Q. Were you referring, when you said, after you got up to the top of the lattice work, you took hold of this and the girder, and then you put your feet in the lattice work, and went up the girder?

A. Yes, sir.

Q. You were then referring to the inclined girder?

A. No, sir.

Q. Did you also go up at the same point?

A. The same point.

Q. Can you show us on this picture how you went up?

The Court: Go down there before the jury and take a pencil and show them how you went up.

(Witness indicates same to the jury.)

The Court: Go along down the line, and show the other jurors.

Mr. Curtis: I would suggest, your Honor, if the jurors have any questions to ask, that you let him come back here, so we all can hear the answer.

Mr. Carpenter: Perhaps I can state it so that all the jurors can hear. Perhaps the men in the back, did not understand.

The Court: If there are any questions the jurors want to ask, they can ask them.

Mr. Curtis: They are all satisfied, your Honor.

Q. So then, we understand, do we, that you went up to the top of this superstructure by using the lattice work alone?

A. The ladder.

Q. Call it a ladder then. You could not go to the top of

184 the bridge by using the lattice work alone, or the ladder? You had to walk up the incline, after you got to the top of the lattice work?

A. You can go a different way, but I always used that way.

Q. But the way you went you could not use the lattice work clear up to the top? You had to walk up the incline after you got to the ladder?

A. Yes, sir.

Q. About how much of a climb was it, after you reached the end of the lattice work, that you had to shinny up?

A. I did not hear you?

Q. How much of a climb was it when you reached the top of the lattice work, that you had to shinny up, about how far did you have to go then, to get to the top of the bridge?

A. From there to about here (indicating.)

Mr. Carpenter: What do you say that distance is, Mr. Foreman?

The Foreman: I should say about four feet.

Q. And when you were making that last four feet, the only thing you had to hang on to there were the edges of the girder?
A. Yes, sir.
Q. With your fingers, and with the strength in your legs and in your knees?
A. Yes, sir.
Q. Were you there the day the Frutcher boy was there?
A. No, sir.
Q. Had you been there with him before?
A. No, sir.
Q. Did you ever see him up there?
A. No, sir.
Q. Did you ever see the police officer there who was on the stand ahead of you?
A. No, sir.
Q. You never saw him there?
A. No, sir.
Q. Weren't there any police officers around when you went up there?
A. Whenever there did happen to be a policeman there I never climbed up there, see?
185 Q. You never climbed up there when an officer was there?
A. No, sir.
Q. When you went up, you always took care to see that there was no police officer there?
A. Yes, sir.
Q. You never went up there when there was a police officer or any other men working on the bridge?
A. I did go up when the men were working there, but I never went up when a cop was there, a policeman.
Q. How many times did you go up when the men were working there?
A. I cannot remember that.
Q. The men were working on the bridge itself?
A. Right near the bridge.
Q. Where do you mean?
A. On the side.
Q. Down on the tracks?
A. I will show you on the picture.

(Picture handed to witness.)

The Witness: They were taking dirt right around here, and dumping it on the other side of the bridge.

Mr. Carpenter: He indicates out here in the roadway, taking dirt here, on the other side.
Mr. Curtis: All right.

Q. Those men were there with dirt carts, taking dirt?
A. They were not always there with carts. They were there with shovels, sometimes, and taking dirt.

Q. How many times did that happen, when these men were working out there, that you went up?
A. Many times.
Q. Had you ever gone up there when anyone was working
186 on the ridge, as distinguished from off of it?
A. I was up there two times when there was a fellow working on the outside of the railing.
Q. What was he doing?
A. I don't know what he was doing. He was hammering away at something.
Q. What?
A. I don't know what he was doing. He was hammering away at something.
Q. How near were you to him at the time you went up there?
A. About from here, to the first row on the other side.
Q. From here to that?
A. About to the other side there. To the door.
Q. What do you mean, the door?
A. The door, yes, sir, and further than that, too, because I was on one end, and he was on the other.
Q. At one end of the bridge?
A. Yes.
Q. That is a much bigger distance than that?
A. I cannot figure that.
Q. About how far do you say?
A. Near the whole length of the bridge.

Mr. Carpenter: Mr. Gilliam, have you the length of the bridge? The length of it from end to end?
Mr. Gillian: 115 feet.

Q. So you never went up the bridge when any-one was right near you?
A. No, sir.
Q. None of these men?
A. No, sir.
Q. You took care to see that they were not near you, didn't you?
A. Yes, sir.
Q. Why were you so careful to see that neither a policeman or any workmen were there when you went up?

Mr. Curtis: We object as immaterial and as incompetent.
187 The Court: That would be perfectly natural, I suppose, why he did not.
Mr. Curtis: That would not bind the plaintiff anyway.
The Court: No, but he can answer the question. It goes perhaps to the credibility of this witness.

Q. You may answer the question, the Judge says. Why were you so careful to see that neither a policeman nor any workman were there when you went up?
A. I did not want to get hit going up there.

Q. You did not want to get hit going up there?
A. No, sir.

The Court: What do you mean by hit?
The Witness: He would just give you a kick in the back.

Q. Had you ever been kicked in the back when you started to go up?
A. Yes, sir.
Q. You had?
A. Yes, sir.
Q. By whom?
A. Some fellow up there. I don't know who he is.
Q. In other words, when you went up, you knew you had no business going up there, did you?
A. No, sir.
Q. Do you tell the Court and jury that although you took care to see that there was no officer and no laborers around there, that you did not know you had no right to go up on the bridge? Don't you know you had no right up there?
A. No, sir.
Q. And yet, although you did not know you had no right there, you took care to see that there was no policeman near, and no workmen?
A. Yes, sir.

Mr. Curtis: The question is argumentative.
The Court: It is argumentative.

188 Q. You never came in contact with the wires in any way, did you?
A. No, sir.
Q. You never, when you got on top of the bridge, you never climbed the superstructure?
A. I don't know what you mean.
Q. You never climbed up to any of the wires did you?
A. I did not climb up the full length.
Q. And you did take care?

Mr. Curtis: I object to that as a conclusion.

Q. Did you take care to keep away from the wires when you went up there?
A. No, sir.
Q. Did you touch them?
A. No, sir, I never touched them. I only climbed up that way.
Q. You did not touch them, but you did not take any care about it?
A. I did not try to touch them.
Q. You did not try to touch them?
A. No, sir.
Q. How near to the wires did you climb when you went up the superstructure?
A. About this. Part way.

Mr. Carpenter: Indicating how much, Mr. Foreman?
The Foreman: About 18 inches.

Q. That was the nearest you ever came to them?
A. Yes, sir.
Q. And how many times did you go up the sueprstructure?
A. I cannot remember.
Q. About?
A. About five times.
Q. About five times?
A. Yes, sir.
Q. And each of those times you say you did not go any nearer than 18 inches?

Mr. Curtis: I object to it as not a question. It is argument.
The Court: It would not make any difference. This is
189 not the boy that was injured. (To the witness:) What age were you when you were going up there?
The Witness: Ten years old.
The Court: How old are you now?
The Witness: Fourteen.
The Court: That is four years ago?
The Witness: Yes, sir.
Mr. Carpenter: Is the question allowed or not, your Honor.
The Court: Yes, he can answer it.

Q. Please answer?
A. What?
Q. And each of those times you say you did not go any nearer than 18 inches?

The Court: He did not say inches, but measure it again, how near you went to the wire.

The Witness: About that. (Indicating.)
The Court: Did you know they were charged with electricity?
The Witness: No, sir.

Q. Why were you so careful to keep away from them?

Mr. Curtis: I object to that; he did not say so.
The Court: He has not said he was careful.
Mr. Carpenter: He said he never went nearer than that.
The Court: You said you were afraid you would fall off what?
The Witness: Off the part of the iron. The piece where I was shinnying up the iron.

Q. You were afraid you would fall off?
A. Yes, sir.
190 Q. And you were not afraid of the wires at all?
A. No, sir.
Q. You were not afraid you would fall off when you got 30 feet above the ground on that bridge?
A. No, sir.

Q. You even played tag on the top of these girders, did you?
A. Yes, sir.
Q. And you knew then that you were about 30 feet above the bridge?
A. I don't know how much.
Q. Did you know you were about 30 feet above the bridge?
A. I did not know it then.
Q. When you were running around playing tag on the top of those girders you were not afraid of falling off then, were you?
A. No, sir.
Q. Do you tell the Court and jury that you did not go nearer to the wires, when you were climbing the superstructure, because you were afraid you would fall, is that right?
A. Yes, sir.
Q. That is the reason?
A. Yes, sir.

Mr. Carpenter: That is all.

Redirect examination.

By Mr. Curtis:

Q. And why?
A. Afraid of falling off.
Q. Why?
A. There is only this piece of iron, and I would be afraid to go up any further than that, because I could not grab on to anything up there. This is all covered, and you could easily grab something. Up here, she is one piece, thin, and I could not grab nothing.

Mr. Curtis: That is all.

By Mr. Carpenter:

Q. When you were running around on top of the girder there was no rail or anything else?
A. That was one thick piece. I was not climbing. I was running. I was not running. I was just walking easy.
191 Q. Do you claim that the superstructure was any different from the lattice work?
A. I climbed up that, and I had to shinny up this (indicating).
Q. When you climbed up in the first instance, you put your feet in the lattice work?
A. Yes, sir.
Q. You did not shinny up there?
A. No, sir.
Q. Not until you reached the top of the lattice work?
A. Yes, sir.
Q. Was the climbing different from here than it was from here (indicating)?
A. Yes, sir, over here, you can grab it with your fingers (indicating).

Q. Do I understand you to tell this Court and jury that the lattice work on the superstructure is any different from the lattice work down below?

A. Yes, sir.

Q. Do you mean to say that the lattice work on the superstructure, that you cannot get hold of it with your hands here, as you can down below? Do you know what I am talking about? I am talking about the lattice work both above and below the bridge?

A. Yes, sir.

Q. Do you mean to say you cannot take hold of it with your hands?

A. You could not take hold of it.

Q. It is not any different above, than it is down beneath, is it?

A. Yes, this was easier for me to climb up.

Q. You can, when you go from the top of the bridge, into this superstructure, use your hands, in taking hold of that lattice work?

A. No, sir, just climb up with my hands, at the bottom, and when I get to the top, I shinny up.

192 Q. I am talking about the time, after you get by shinnying, and get on the top of the girder, when you go from there on the superstructure, you use the lattice work the same as you did before, don't you?

A. No, sir.

Q. You could do it, couldn't you?

A. Yes, sir, but I never did it.

Mr. Carpenter: That is all.

By Mr. Curtis:

Q. At any rate, you were not afraid when you were on the broad pieces of iron?

A. No, sir.

Q. But you were afraid when you got up on the thin pieces, up high, is that right?

A. Yes, sir.

Mr. Curtis: That is all.

Mr. Carpenter: That is all.

JOHN H. MORECROFT, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Curtis:

Q. What is your name?

A. John H. Morecroft.

Q. Mr. Morecroft, where do you live?

A. I live in Palisades, New Jersey.

Q. What is your occupation?

A. My occupation is teacher and consulting engineer, electrical engineer.

Q. Where are you connected as a teacher?

A. I am connected with Columbia University.

Q. In what department?

A. In the department of electrical engineer.

Q. Where did you graduate?

193 A. I graduated from Syracuse University, with the degree of electrical engineer.

Q. When?

A. In 1904.

Q. Have you pursued the occupation of electrical engineer since that time, in connection with your scientific studies, and as teacher in Columbia University?

A. I have.

Q. And are you familiar with the science of electricity, and with the methods in which it is used?

A. I am.

Q. Now, at the request of the attorney for the plaintiff in this case, did you visit this bridge at East 149th Street?

A. I did.

Q. About when?

A. About three weeks ago.

Q. I show you Plaintiff's Exhibit No. 1, and ask you whether that is a fair representation of the bridge, the way it is now, the way you saw it?

A. Yes, I think it is.

Q. Now, Mr. Morecroft, you found no guards of any kind around these wires, did you, above the bridge?

A. No, I found nothing there that I would call a protector.

Q. Was there anything around the wires at all, excepting the bare wire?

The Court: Let him mark the wires, exactly what he found.

Q. Was there anything around the wires at all?

—. There is nothing directly around the wires which could be called a protector. There is a piece of iron work higher——

Q. I am talking about the wires that extend across the bridge. Is there anything around them whatsoever?

A. There is a piece of angle work up there.

The Court: Who knows what that is, except he is an ex-
194 pert, or somebody who has been used to testifying.

The Witness: This iron went in in the form of an angle, but this is so far away that it is not a protection against the wire.

Q. How far away was it?

A. That piece of iron work was probably around 4 to 6 feet away from the wires.

Q. Did you examine the girders, and the lattice work of the bridge proper?

A. I did.

Q. Did you find any rivet heads extending from the girders, on the surface of the girders?

A. Why, yes, sir, it is a normal bridge, and has many rivet heads everywhere throughout it.

Q. There are rivet heads there?

A. There are rivet heads there.

Q. Tell me, from your experience, and from your studies on the question of electricity, and of the use of electricity, in the use of wires on a bridge which is a public highway, what could have been done to protect anyone from coming in contact with these wires?

A. It is my opinion——

Mr. Carpenter: I object tothat, if your Honor please. It is not what could be done, but what is reasonably required.

Q. What should reasonably have been done. What could very reasonably be expected that the railway company could do?

Mr. Carpenter: I move to strike that out.

The Court: Yes. Strike out his answer.

The Witness: That there should be built around these wires some kind of lattice work, lattice work, or something of that kind, so that——

195 Mr. Carpenter: I object to this, if the Court please, and move to strike it out on the ground that this witness is not competent to testify to any such thing, and that he is invading the province of the Court and jury.

The Court: That is not the usual line of investigation of expert witnesses. Expert witnesses are called upon to tell what they have seen and heard by an hypothetical question, which covers something in the case, for the matter under observation. This witnesse describes these wires, and he describes them in the condition in which he saw them, when they are safe, and then when they are not so safe. Not to testify to what railroad companies ought to do.

Mr. Curtis: I am trying to keep him from arguing, your Honor, but instructors and teachers, will argue all the time.

Mr. Carpenter: Do I understand my motion is granted, your Honor?

The Court: Yes. Strike out that answer.

Q. Kindly follow his Honor's intimation, that you answer the question. We do not want argument.

The Court: We do not want any thesis from you. Just state how you found these wires, and whether in your opinion they were safe, and if they were not safe, why they were not?

Q. Describe these wires as you found them?

A. I found these three wires, or six wires, rather, in the place I examined them. Just as represented in the photograph.

Q. How did they go? How were they suspended across the
196 bridge?

A. They were suspended from iron cross arms, on which there are insulators, this being a steel lattice tower on the top of the bridge, and on this lattice tower there are four iron cross arms, and on these cross arms there are porcelain insulators, and on these insulators, there are the wires in question.

Q. These porcelain insulators merely prevent the upright or the arm from becoming charged with the current which runs through the wires?

A. Yes.

Q. Is that so?

A. That is so.

Q. Do you state now that the rest of the wire that strings across the bridge, do you say that the rest of these six wires, were entirely bare, and not surrounded with any protection?

A. Right.

Q. Now, assume that this was a public bridge, and part of a highway at East 149th Street, New York City, and assume that it was used by children as well as by adults, and assume that within 300 feet of this bridge, was a large tenement district, which houses a great many people and assume that it was possible, and not only possible, but the fact was that children did climb up around the structure of this bridge. Can you give us an expert opinion as to whether or not this construction of these wires, and this maintenance of these wires was safe?

Mr. Carpenter: I object to that question as incompetent, and immaterial. He is asking whether he can give an expert opinion.

The Court: He is qualified as an expert, in electrical uses, and in electrical operation of these wires. This is his opinion, and
197 that is all he is asked for. It is not binding, of course, on the jury. Answer the question.

Mr. Carpenter: Exception.

A. It is my opinion that it is not safe.

Q. And was not safe?

A. And was not safe when I inspected it.

Q. As a matter of fact, when you inspected the bridge, were there any people upon the structure?

A. At the time I inspected the bridge there were no children on the super-structure, but there were some people on the bridge. I asked one of these, just as I——

The Court: Never mind that now. What were they doing on the bridge?

The Witness: I assume, your Honor, they were playing around there. There was a ball game on in the vicinity, and I suppose the children were just playing around there.

Q. Did those children at any time while you were there, climb up on the bridge, that you saw?

A. One of them did.

Q. In your opinion, under the conditions and assuming the conditions I have already propounded to you, what should in the exercise of reasonable care, in your opinion, as an electrical expert, have been done, or what should have been constructed around these wires?

Mr. Carpenter: I object to that.

The Court: His opinion would not be binding on the jury.

Mr. Curtis: It would be of some value in a case of this character. The city frequently has occasion to repair pipes in the streets, and they send men down with hammers and chisels——

198 The Court: Is he going to say that those wires were not safe, in view of what he saw around there? In this case, it is not the highest degree of care, but it is the usual and ordinary care by similar people, engaged in similar lines of endeavor.

Mr. Curtis: I have a case right here, sir, in which our Court of Appeals says that knowing about these high tension wires, that they are bound to the highest degree of care.

The Court: Isn't that a matter for the jury to arrive at? He said they were not safe, but to pass upon the care and caution of the defendant, does not seem to me to be proper.

Mr. Curtis: It is merely, after all expert opinion, and is only some evidence for the jury to consider, that is all.

The Court: Yes. I do not think it has been indicated in the operation of wires over railroad bridges either, and I sustain the objection to this question.

(Cases cited to the Court by Mr. Curtis.)

The Court: If this witness is familiar and knows of the processes and methods adopted by other companies, in using wires across bridges under similar circumstances, he may testify.

Mr. Curtis: Suppose that all the companies are careless in that respect?

The Court: That is for the jury to say, under all the circumstances shown in the case whether they are or not.

199 Mr. Curtis: For years the gas company used no shields around their pipes, when they were tapping them, and finally a gas case was brought, on the theory that a shield could be spread around the pipe, in the interest of safety, and that is now the law of this State, but few of them did it before that.

The Court: I do not think it is competent.

Mr. Curtis: We respectfully except. Then I understand that the statement of this witness that this place was not safely maintained, is stricken out?

The Court: I don't know. He just testified that he did not think this was safe, and not what would make it safe.

Mr. Carpenter: Your Honor leaves in his opinion that in his opinion it was not safe?

The Court: Yes.

Mr. Carpenter: I move to strike it out, on the ground that it does not appear that he is basing that opinion as formed from his experience with companies using that type of structure, and I object to it as incompetent, irrelevant and immaterial.

The Court: Motion denied.
Mr. Carpenter: Exception.
Mr. Curtis: That is all.

Cross-examination.

By Mr. Carpenter:

Q. Did you make any test of the wires there to find out what the voltage and amperage was?
A. I did not.
Q. So of course when you made your examination, you did not know what was in the wires, and the amount of power there?
200 Naturally, if you did not test it, you did not know?

Mr. Curtis: If counsel is going to answer his own question, the witness might as well be withdrawn.
The Court: This is cross-examination, and he can put his question in such a way as he thinks will reach it.

Q. You did not know, of your own knowledge, if you did not test it, did you, what was in the wires?
A. I knew from the type of insulation used at this time, that this was a high voltage transmission system.
Q. But how much current it carried, or what the voltage or amperage was you did not know? Did you, yes or no?
A. I teach these things. I can tell you, by looking at the installation, what voltage there is in the wires.
Q. You tell the Court and jury, that because you teach these things, that you can tell, from the wire, what voltage is in it?
A. I can tell for what the wire is used.
Q. Can you tell the amount of current it carries?
A. I can tell how much it is supposed to carry.
Q. Can you tell how much it does carry?
A. At the time I looked at it?
Q. Yes.
A. No.
Q. You did not know, at the time you went there, what voltage these wires carried, did you?
A. A switch may have opened in the line. The line was an 11,000 volt line, as any engineer could tell by looking at it.

Mr. Curtis: Was there a sign there, 11,000 volts?
201 The Court: Just answer him that you do not know, if you do not know.
The Witness: I did not know.

Q. Have you ever had any experience with the propulsion of power used for electricity, for propulsion purposes, for carrying in wires or used in transportation? Have you ever had any experience with it?

Mr. Curtis: Did you hear the question, Mr. Witness?
The Witness: I did. I am a consulting engineer, and I have done a great many different jobs.

Q. I did not ask you that. Have you had any experience with electricity used for transportation purposes?

A. I have worked on testing motors, and things of that kind.

Q. Have you ever had any experience with electricity used for transportation purposes?

A. I have, because it is all of the same kind.

Q. Where?

A. As I say, it is all the same kind.

Q. Where have you had experience with electricity used for transportation purposes?

A. I worked for the Westinghouse Company two years after I graduated from college.

Q. Where?

A. Helping them to install a substation in Syracuse, the purpose being for furnishing power for electric cars.

Q. Where was that?

A. That was at Syracuse.

Q. What company was that for, what power company?

A. The power company operating to Niagara Falls, and Syracuse.

Q. A trolley system?

A. Well, you see, the power came over a high voltage transmission system, and in these different cities it was used for the trolley.

202 Q. That is your only experience with electricity used for transportation purposes?

A. Yes.

Q. On this trolley system that you refer to, the company in Syracause, what was the voltage in those trolley wires?

A. 600.

Q. 600 volts, is that what you mean?

A. 600 volts.

Q. And was that alternating or direct?

A. When it came into the sub-station it was alternating, but on the trolleys it was direct.

Q. How long did you work there?

A. I worked there probably six weeks.

Q. Did you have any other experience with electricity used for transportation purposes?

A. No.

Q. Six weeks experience you had then, is that right?

A. As you have defined it.

Q. And that transportation company used 600 volts only?

A. On the trolleys.

Q. And on the trolley wire itself what was it, was it alternating or direct?

A. Direct.

Q. Can you describe or name any company maintaining any bridge structure—I withdraw that—have you ever worked on wires charged with 11,000 volts?

Mr. Curtis: I do not see any proof about 11,000 volts, if your Honor please.

The Court: They are examining him as an expert, and I will let him go into it.

Q. Have you ever done any work around wires charged with 11,000 volts?
A. Yes, sir.
Q. When was that?
A. In the laboratory.
Q. When was that?
A. I do it all along. I do it up to 100,000 volts.
Q. Have you ever had any experience with any company outside, or have you ever done any work for any company on wires
203 charged with such a voltage?
A. I have not.
Q. You have not?
A. No, sir.
Q. Have you made any study of the question of protecting wires on bridges?
A. I have.
Q. Have you made any investigation of the standard practice prevailing among transportation companies, of protecting wires placed in circumstances similar to this?
A. I have made this study.
Q. Have you made any investigation, I said, personal investigation, using your own eyesight and observation, of the prevailing practice?
A. In so far as possible, yes.
Q. Have you ever investigated the practice prevailing on the Norfolk & Western?

Mr. Curtis: That is objected to as incompetent, irrelevant and immaterial.

The Court: He has not said he knew anything about practice. He said he would consider, from his knowledge of electrical wires, and of this power, and from his observation of these particular ones, he said it was not safe to leave them in that particular condition. He never testified he had examined and inspected and gone around over these different railroad systems, and seen their oprations and all that sort of thing.

Mr. Carpenter: Does your Honor maintain therefore that on behalf of this client, I cannot test his credibility, and see, by finding out, what he knows of the practice among these companies that I cannot ask him how they maintain these wires under such circumstances?
204 The Court: No. He has not qualified for that.

Mr. Carpenter: I take an exception to your Honor's refusal to permit me to cross-examine him.

Redirect examination.

By Mr. Curtis:

Q. When you went to look at this bridge and these wires, was there any indication at any place, as to what the voltage of the wires was? Wasn't there a sign right there, "11,000 volts"?

A. I saw none.

Mr. Curtis: That is all.

Recross-examination.

By Mr. Carpenter:

Q. When you said that this condition as you saw it there was unsafe in your opinion, in what respect was it unsafe, and to whom was it unsafe?

A. In my opinion it was unsafe, because children, finding this bridge, might easily come in contact with its wires, and it was unsafe in this way, that it was my opinion, when I inspected it, that it was easily possible to get rid of this danger, by a very simple device from the structure underneath the wires. To that extent I call it unsafe. Apparently, the precautions were not taken which could have been taken.

Q. Can you name a company which has those wires which has taken those precautions?

Mr. Curtis: I object to it, your Honor, as cross-examining on a subject he brought out himself.

The Court: Objection sustained. That is the answer to your own question, whether or not it could have been made safe.

205 Mr. Carpenter: I am asking him whether he could name any company which has those wires, which has taken those precautions.

The Court: That is going right back to the question. Objection sustained.

Mr. Carpenter: Exception.

Q. This structure which you have in mind, is what type of structure? What is it made out of?

A. The structure I have in mind would be an iron lattice work built underneath the wires, above the top part of the bridge, so that any boy getting on the top of the bridge, could not, even though he tried, touch these wires. It would be simply an iron mesh, such as is used in banks and for other purposes, to protect for other purposes.

Q. Now, referring to Plaintiff's Exhibit No. 1, in your opinion, to make this place safe you would have to, underneath these wires, you would construct a lattice work, completely covering the space underneath these wires? Is that what you mean?

A. I would construct a lattice work covering the place underneath the wires to such an extent that a boy standing on the top girder of the bridge, could not touch the wires. That is, for a distance perhaps

of two feet on either side of the girders of the bridge, so that the whole structure, underneath these wires, would be perhaps six feet long, along the wires.

Q. Extending out three feet from either side of the uprights which hold the wires?

A. Extending out three feet from either side of the top girder, on which the boy might be standing.

Q. It would be above his head?

A. Yes, it would be above his head.

206 Q. The lattice work would be above his head as he stands on the top of the girder?

A. Yes, sir.

Q. And it would be out from the uprights, which hold these wires, three feet on either side?

A. Yes, sir.

Q. And underneath these wires?

A. Yes.

Q. And if that had been done, you would consider this place safe?

A. Then, in my opinion, the installation would have been safe.

Q. Have you borne in mind the distance that those wires were above that bridge?

A. I have.

Q. Above the top of the bridge?

A. Yes.

Q. How high were they?

A. Approximately six feet.

Q. Do you tell this Court and jury that a boy, six or seven years old, could reach six feet up, and touch this wire when standing on the girders.

A. I did not.

Q. So, if he was on top of the bridge, he would not come into the zone of danger, until he climbed the structure?

A. It would depend on how big the boy was.

Q. Assuming the average boy, seven years old. Stand up. The Fruchter boy will please stand up. All right. Never mind. The average boy, seven years old.

A. The average boy seven years old could not reach six feet above his head, I presume.

Q. You concede that, don't you?

Mr. Curtis: Of course, we concede it.

Q. When you describe this structure, which you consider necessary to protect the wires, how are the men going to climb up there into the wires, and around that structure, for the purposes of inspection and repair?

207 A. I would consider it easy of inspection in cases like this, and I would have the men take the structure down, to inspect the wires at that point.

Q. You would have a steel structure attached?

A. Attached.

Q. And then you would have the men take it down, when it was to be inspected?

A. They would not have to take it down, unless they actually had to get at the wires.

Q. When they actually got at them, they would have to take it down?

A. Yes.

Q. That would be the practice that you would contend for as being reasonable and safe?

A. Yes, sir.

Mr. Curtis: I object to that as already answered.

The Court: Allowed.

Q. Can you name any company that has any such practice as that in use?

Mr. Curtis: I object to it.

The Court: Why do you want to repeat that? I sustain the objection.

Mr. Carpenter: Exception. That is all.

Mr. Curtis: That is all.

GEORGE SHEINBERG, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Curtis:

Q. What is your name?

A. George Sheinberg.

Q. Are you a physician and surgeon?

A. Yes, sir.

208 Q. And are you admitted to practice in the State of New York?

A. Yes, sir.

Q. When?

A. Since 1914.

Q. In 1916 were you connected with any institution?

A. Yes, sir.

Q. What?

A. The Lincoln Hospital.

Q. Do you remember on June 9th, 1916, seeing this boy, David Fruchter?

A. Yes, sir.

Q. Where did you first see him?

A. I first saw him in the neighborhood of the——

Q. In the neighborhood of the Lincoln Hospital?

A. In the neighborhood of the Lincoln Hospital, yes.

Q. Tell us what you discovered—I withdraw that for a moment—at that time, did you make a thorough examination of him, or did you do that later?

A. I made an examination on his left—the ambulance surgeon brought him in at that time, and I, being the house surgeon, I was immediately notified about the case, and came down and examined the boy, and found him in a severe shock, in a practically unconscious state. On specific examination I found the left hand entirely burned, down to the bones, and the left forearm, the muscles being burned two-thirds down to the bone, especially on the anterior surfaces, on this side here (indicating), two-thirds of the arm was superficially burned, all the way down the left arm. Outside of that he had multiple electric burns on various parts of his body, at or about the right knee, the right hand, and other various parts that I cannot remember.

Q. Have you any record from which you could refresh your memory as to just where those burns were?

A. Yes, sir.

209 Q. Kindly do it, if it refreshes your memory.

A. That was on the right hand, the right knee, and the left leg, and the left foot, and four scars on various parts of the body.

Q. What was done with him and for him?

A. For the first eight hours nothing else could be done to him but try to revive him, and get him out of his shock, and he was immediately taken up to a ward, where he was put under stimulants, and as soon as he was brought to a sort of semi-conscious state, there was a necessity for an immediate operation, or for the removal of part of the arm, and that was rushed, and he was taken into the operating room.

Q. That was necessary for what reason?

A. To save his life, and he was taken into the operating room, and his entire forearm up to the elbow joint was removed.

Q. Cut off?

A. Yes, sir.

Q. Then what?

A. This was done with the hope of saving the arm, which extended from the shoulder down to the elbow, but later on, he showed no marked improvement, but on the contrary, the poison known as gangrene had set in in the lower two-thirds of the arm, in the lower two-thirds of the arm remaining, and in spite of all we could do, it was eventually necessary to have another operation. This was done to prevent general sepsis, and in this way it was done to save his life, as his temperature was 103 and 104, showing that he had blood poisoning, and that his life was in danger, so I—I just cannot remember the date, but I might refresh it from the chart.

Q. You can refresh it from your record.

A. When the second operation was performed—on August

210 8th the second operation was performed, and then the remaining part of the left arm was removed, there being only about five and one-half or five inches of a stump, and it was not closed, because there was quite a good deal of infection, so we left it open, with a drainage, with the hopes of getting all of the poison out of the remaining portion of the stump. I rendered no other

treatment during the entire time I was house surgeon, from the day of admission, until the day I was discharged from the hospital, October 1st, and when I left he was still in bed part of the time, with a discharging wound, and I have not seen him since until recently.

Q. When you left the hospital on October 1st, he was still in the hospital?

A. When I left the hospital on October 1st he was still in the hospital, yes, sir.

Q. With this open wound in the arm?

A. Yes, sir.

Q. Of course, necessarily, all during this time, except when he was under anæsthetics, his condition gave him intense pain?

A. Yes, sir, he was in a good deal of pain, and we had to keep the pain under control, with very small doses of opium, or other narcotics. It was necessary to control his pain and sleeplessness.

Q. What was done with regard to the other wounds, on the leg and foot and head?

A. A few wounds were dressed locally by means of applications, and some were treated by electric light.

Q. What is that?

A. For the first few days, he was put in an electric bath entirely, and this was used in order to give him artificial heat, because his body did not contain much heat, and we had to produce
211 heat by external means. In other words, we tried to produce a sort of an incubator, in order to keep him alive, and carry him over the danger zone from the shock.

Q. How long did that cover?

A. He had been in the electric bath for a period of three and a half to four weeks.

Q. What else was done?

A. We used local dressings, and occasional incising opening and draining the local inflammation that would set in from the burn.

Q. Assuming, doctor, that the boy came in contact with a live wire, containing electricity, and thereafter was found with the burns you speak of on his arm, and on the leg and foot, in your opinion, would the burning which he received at the time he came in contact with the wire, be a competent producing cause for such burns and injuries?

A. Yes, sir.

Q. And would it be a competent producing cause, which would necessitate the amputation of the arm?

A. Yes, sir.

Q. His mother has testified that for about a year afterward, he limped with the leg which had been burned, and that there are scars there. Can you testify, doctor, with reasonable certainty, that the injuries which he received from being burned by this electric wire, that that burning was a competent producing cause for such pain in the leg and the limp?

A. Yes, sir, also producing a partial contraction there of the scar tissue.

Q. The contraction of the scar tissue, caused by the burns caused the limp?

A. Yes, sir.

Q. And that gives pain?

A. Not after the scars form, but during the process of the healing, it of course gives pain.

212 Q. But pain is felt, for a while, when you stretch that scar tissue?

A. It will give pain, due to the nervous tension in the scar tissue.

Q. And can you say, with reasonable certainty, whether that accident, and the injuries received at that time, were a competent producing cause, as to the limp, and as to the pain which the boy afterwards suffered from?

A. Yes, sir.

Q. Will you tell us, doctor, about how long he was in the hospital altogether, from the records?

A. He was admitted June 9th, and he was discharged on September 11th, 1916.

Q. What did you mean by saying that on October 1st he was still there?

A. My term expired at the hospital, on October 1st. I was house surgeon until that time, and then I left, and I left him there as a patient. My term at the hospital expired.

Q. I know that, but I thought you said when you left October 1st, he was still in the hospital?

A. Yes, sir.

Q. You say he was discharged in September. September is before October. Or was he re-admitted? The evidence is he was re-admitted, wasn't he? He came back for treatment?

A. Yes, sir, I think he was re-admitted afterwards.

Q. That is what happened, you understand?

A. Yes, sir, he was admitted later on.

Q. You don't know how long he was treated for that?

A. No, sir, I was not connected with the hospital then.

Mr. Curtis: I think that is all, your Honor.

The Court: Are these injuries, aside from the arm permanent or temporary? When you ended your treatment, can you state

213 whether the leg was likely to give him future trouble, or whether it will in any way incapacitate him from earning his livelihood?

The Witness: As far as his body is concerned, no, but as far as his arm is concerned, I would say yes, because the scars do give him occasional pain, and discomfort, especially in weather which is damp weather, or in rainy weather. As far as his walking is concerned, apparently he is all right.

Q. Of course, doctor, these scars are permanent?

A. Yes, sir.

Q. You told us you examined him a few days ago?

A. Yes, sir.

Q. Will you please tell us when that was?

A. That was on July 29th, 1920.
Q. Will you tell us what you found?
A. I found a left arm stump, about five and a half inches in length, which is markedly atrophied.
Q. And what is atrophy?
A. In other words, the muscles around the stump, the shoulder, are wasted, or are not as large as the muscles in the right arm.
Q. From non-use?
A. Yes, sir.
Q. Anything else, doctor?
A. And then he shows various scars and contractions of scars on the different parts of his body, which has been burned, especially the right hand and knee, and little scars here and there all over the body.

Mr. Curtis: That is all.

Cross-examination.

By Mr. Carpenter:

Q. Doctor, were you there when the boy was readmitted, so you can give us the date?
A. I was still there, but I was not in charge. I was not on service on that day.
214 Q. Just refer to the records and tell us when he was re-admitted?
A. These records are not the re-admission charts. They usually have two charts, when a patient is discharged, and when he is re-admitted. They have another chart, and this is the first chart, but I have not got the other chart, so I cannot refer to it, by these records here.
Q. This burn on the leg, will you describe how big that was, please?
A. I cannot just recall how big it was. I would have to look at the record.
Q. Yes, that is all right. Go ahead and look at your record.
A. A large wound, about one and a half inches square.
Q. One and a half inches square?
A. Yes, sir.
Q. And on just what part of the leg was that?
A. On the front part of the leg.
Q. What?
A. The anterior part.
Q. And where, with reference to the knee?
A. Around the knee. Just about the middle part of the leg.
The Court: On the shin?
The Witness: On the shin, yes, sir.
Q. Down on the shin?
A. Yes, sir.
Q. That was on which leg?
A. On the—the records do not mention which leg.

Q. Do you recall which one it was?

A. I do not recall exactly, but I think it was on the right leg. I am not sure.

Q. Was that the only burn on that leg?

A. Well, he had a few smaller burns, which it don't make any mention of. I just cannot remember the smaller burns.

Q. What degree of burn do you claim this one was on the shin?

A. That was the third degree because it was right down to the muscle.

215 Q. The other burns, do you recall where they were on the leg?

A. I do not recall just the places, but I know there were quite multiple burns.

Q. Was there any burn on the leg, do you remember?

A. I don't remember.

Q. Does your record show it?

A. No, sir, it was only on one leg.

Q. Only on one leg?

A. Yes, sir.

Q. How long did it take for that wound to heal up on the leg?

A. Well, it has been healing up until he was discharged the first time from the hospital, until I saw him, it still required dressing, and on his re-admission I did not see him.

Q. But it was practically healed over, of course, or you would not have discharged him from the hospital in September?

A. No, sir. There are two ways of discharging patients from the hospital, cured, and cured requiring further treatment. He was discharged as improved, and as requiring further treatment.

Q. In other words, it was not necessary to keep him in the hospital, but he used to come back for treatment?

A. As soon as a patient is able to get out of bed, the hospital tries to discharge him as soon as possible, because they can be taken care of at home, by their own physician.

Q. Was there any other third degree burn or second degree burn on his legs?

A. Not on his legs. There may have been second degree burns, small ones, on his leg. That I don't remember, or the size of the burns.

Q. And you cannot tell us, by referring to the records?

A. No, sir.

Q. The hand of course which was burned the worst was the left hand?

A. Yes, sir.

216 Q. And as I understand it, that was burned, in taking hold of the wires?

A. That was burned down to the bones, also involving the bones, and it contracted the hand on itself.

Q. But the palm was the worst part?

A. Yes, sir.

Q. And the next was the forearm?

A. And the next was the forearm and then the arm.
Q. Those were all third degree burns?
A. Yes, sir. There are no more than three degrees, so we can call them third degree.
Q. Were there any substantial burns on the right side of his body?
A. Yes, sir, he had a burn on the right side of his body there, on the chest, I think.
Q. But none on the right hand?
A. The right hand too, yes, sir.
Q. Where was that?
A. It says here, a few lacerations and burns on the right upper extremity and back, on the right arm and back.
Q. Was there any on the right hand?
A. Yes, sir, he had a small burn on the right hand.
Q. Do the records show that?
A. Yes, sir.
Q. A small burn on the right hand?
A. Yes, sir.
Q. From your subsequent examination, have you determined whether the boy's use of his leg is practically normal now?
A. As far as his walking is concerned, it is practically normal, as I said before.
Q. Can he get around and play on it, as he did previously?
A. Yes, after I examined him, I think it is so.

Mr. Carpenter: That is all.
Mr. Curtis: That is all.

217 JOSEPH WALLACH, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Curtis:

Q. What is your name?
A. Joseph Wallach.
Q. Where do you live?
A. 949 East 156th Street.
Q. Are you a physician and surgeon?
A. Yes, sir.
Q. Of how many years' standing?
A. Since 1911.
Q. Where did you graduate?
A. Long Island College Hospital.
Q. Do you remember attending David Fruchter?
A. Yes, sir.
Q. When?
A. In 1916, September.
Q. Will you kindly tell his Honor and the jury what you found on that examination?

A. At the first examination he had a burn on the right leg, and the stump on his left arm was suppurating. He had numerous burns on the hand and both legs.

Q. What did you find with regard to his arm?

A. It was a suppurating stump. There was pus coming out from it. That was after he was discharged from the hospital.

Q. You did not see him until when?

A. September 12th was the first time.

Q. When you saw him, there was still pus coming out of the arm?

A. Yes, sir.

Q. What did you discover, if anything, with regard to his nervous condition in September of 1916?

A. No, sir, I did not.

Q. You did not what?

A. I did not find anything the matter with his nervous condition.

Q. Will you describe the course of your treatment, please?

218 A. It was all local treatment, trying to heal up the pus, and trying to get rid of the pus, and healing up the open wound on his left arm. He had a sinus there, which had to be cut several times, in order to get it healed together. It covered a period of over four months.

Q. That was with regard to the arm?

A. That was with regard to the arm.

Q. What did you do with regard to the burns on the leg and the foot?

A. The burns on the leg were all local treatment, but it did not require that long. It only took about a month or so, before it was entirely healed.

Q. That is, the surface was healed?

A. Yes, sir.

Q. His mother says that for about a year afterwards, he limped somewhat? Did you discover scar tissue?

A. Yes, sir.

Q. Could you say whether or not the injuries, such as he received, would be a competent producing cause for that condition?

A. Yes, sir.

Q. And of course these scars are all permanent?

A. They are.

Q. And naturally, these burns on the different portions of his body, were necessarily accompanied by pain and suffering?

A. Yes, sir.

Q. How long do you say you treated him, doctor?

A. For a period of over four months.

Q. When was the last time you saw him?

A. For treatment or for examination?

Q. For examination?

A. July 29th, 1920.

Q. What was the condition then?

A. His left stump was five and a half inches long. There was a slight atrophy of the stump. He had a cicatrix in the palm of the hand.

219 Q. A cicatrix?
A. Yes, sir.
Q. What do you mean by that?
A. Scar tissue. If you bring the boy up here, I believe I can show it very much better.
The Court: No.
The Witness: Scar tissue on the palm, and the part of the small, ring, middle and index fingers. A small piece of scar tissue right along there.
Q. That was last month you found that?
A. Yes, sir, he had scars on both knees, the right leg, the sole of the left foot and he complained as if electric needles were running through the stump, of the left arm at that time.
Q. Would that be a natural consequence of the injury he had to that arm?
A. Yes, sir, because of the nerve tissues involved in the stump.
Q. Can yau say, doctor, with a reasonable degree of certainty, whether or not that condition is a permanent one?
A. It is.
Q. For the rest of his life, he will at times have the feeling, as if needles were being stuck into the stump?
A. Yes, sir.
Q. In regard to his leg, tell us what you found?
A. He had two scars on the right and left leg. On the right leg, it was one inch and a half by an inch and a half, not on the leg, but on the right knee. On the left leg, on the inner side of the knee, was a scar one and three quarter inches by one inch. On the inner part of his right leg was a scar four inches by two inches. On the sole of his left foot, was a scar one and a half inches by one inch.
Q. Will you give us the full account of the condition that you found the last time?
A. Well, he had scar tissue over the arm and the hand and leg, and slight atrophy of the stump, which was five and a half
220 inches long. The length of his right arm was 23 inches from the top to the point of his hand. His gait was normal.

Mr. Curtis: I think that is all.

Cross-examination.

By Mr. Carpenter:

Q. So that there is no permanent disability in his legs?
A. Not in his legs, sir.
Q. The permanent disability of course consists in the injury to the arm?
A. In his arm, yes, sir.
Q. That is the only permanent disability you found?
A. Yes, sir.

Mr. Carpenter: That is all.

HYMAN WOHL, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Curtis:

Q. What is your name?
A. Hyman Wohl.
Q. Hyman, where do you live?
A. 763 East 152d Street.
Q. What is your business?
A. Letter carrier work.
Q. How old are you now?
A. Eighteen.
Q. Did you know this bridge where David Fruchter got hurt?
A. Yes, sir.
Q. On the East 149th Street bridge?
A. Yes, sir.
Q. Did you hear of David getting hurt?
A. Yes, sir.
Q. And did you know that bridge before that time?
A. Yes, sir.
221 Q. About how long? For many years?
A. For seven years.
Q. Now, before the time that David got hurt, had you ever climbed up on that bridge?
A. Yes, sir.
Q. During how many years before 1916?
A. About three or four years.
Q. And what did you climb the bridge for?
A. For the bird's nest, and to have a little fun playing tag.
Q. You and other boys used to go up on the bridge?
A. Yes, sir.
Q. At any of the times that you climbed the bridge—I withdraw that for a moment—Under the bridge were railroad tracks?
A. Yes, sir.
Q. And there was a railroad yard there, not far away?
A. Yes, sir.
Q. At any of the times that you climbed the bridge, did you see any men working in the yard?
A. Yes, sir.
Q. And on the tracks?
A. Yes, sir.
Q. Will you tell us please, Hyman, how you used to get up on the bridge?

The Court: Get down before the jury, and take the photograph and explain it to the jury.

The Witness to the jury: Right over here there is rivets (indicating on photograph), and I climbed up there.

Juror No. 6: There are rivets running alongside this girder?

The Witness: Yes, sir.
Juror No. 6: Right straight up to the top?
The Witness: Yes, sir.
Juror No. 7: Where did you hold on?
The Witness: On this side (indicating).
222 Juror No. 7: Where did you get your hold on?
The Witness: On these two sides of the iron (indicating). Right in here is where I climbed (indicating).
Q. That girder is not straight?
A. No, sir.
Q. It is on an incline or a slant?
A. Yes, sir.
Q. That is where you went up, and where you say other boys went up?
A. Yes, sir.

The Court: Come back to your seat.

Q. Did anybody ever warn you away from there?
A. No, sir.

Mr. Curtis: That is all.

Cross-examination of Hyman Wohl.

Cross-examination.

By Mr. Carpenter:

Q. When you played tag up there, you ran around on the top of the girders, didn't you?
A. No, sir, we didn't run. We walked the top there.
Q. And when you would walk along on top of the girder, you had nothing to hang on to, did you?
A. No, sir.
Q. And was this bird's nest above the top girder or below it?
A. When we walked along the top there, under these planks, or in the corners, were the birds' nest-.
Q. Just on a level, a little lower than the top of the girder?
A. Yes, sir.
Q. That is where the birds' nests were?
A. Yes, sir.
Q. You did not go up into the superstructure, above the top of the bridge?

Mr. Curtis: I don't know whether he knows what that is.

Q. I am going to explain it. The superstructure, where
223 the wires are held up. Do you know that superstructure that holds the wires up, above the top of the building?
A. Yes, sir.
Q. You did not go up there after the bird's nest?
A. Yes, sir, once in a while when somebody was chasing us, when we were playing tag, we would get up there.

Q. How high did you go?
A. We would not go very high.
Q. How high did you go?
A. About two or three feet.
Q. You did not go any higher, you say, on account of the wires being there?
A. I did not know what the wires were at that time. I did not know if they were covered or not. I never went up there.
Q. At any rate you did not go higher than two or three feet above the top of the bridge, did you?
A. No, sir.
Q. And you tell the Court and jury you did not know whether the wires were there or not?
A. I did not know whether they were covered or not, so I never went near them.
Q. You knew the wires were there, but you did not know whether they were protected or not?
A. Yes, sir.
Q. And the reason you only went two or three feet up, was because you were not sure whether it was safe to go any nearer than that?
A. Yes, sir.
Q. Had you ever climbed up that bridge when there were any policemen there?
A. There was no policeman around very often. Once in a while. One day you would see him and the next five days, you would not see him.
224 Q. Did you ever go up there when the policeman was there?
A. If I was up there, I would come down again when I saw the policeman.
Q. If you saw him coming, you came down? You came down fast?
A. Yes. I came down gradually. I came down easy.
Q. Were any men working on the bridge structure above the roadway, when you went up on it? The part of the bridge above the roadway?
A. No, sir. They were working down east of the bridge.
Q. Down on the tracks?
A. Yes, sir.
Q. And over in the yard around there?
A. East of the bridge, they were working there too.
Q. You know where the railroad yard is there?
A. Yes, sir.
Q. That is about a quarter of a mile away, do you say?
A. No, sir.
Q. How far?
A. About a block or so away from the bridge.
Q. A block or so?
A. Yes.

Q. Between a block and two blocks you mean?
A. Yes, sir.

Mr. Carpenter: That is all.

Redirect examination.

By Mr. Curtis:

Q. You say there were men working east of the bridge?
A. Yes, sir.
Q. What did you mean by east of the bridge?
A. The part towards the river.
Q. What?
A. Up on the side of the river.
Q. Up or down?
A. Down.
Q. On the tracks?
A. No, on the side, east, to the tracks.
Q. Show the jury where you mean.

(Witness indicated to the jury.)

225 The Witness: They were working on the other side of this here bridge, over here, down there, that is where they were working, and some were working under the bridge by the tracks, and testing the track.

Q. I show you this other picture, Hayman (handing photograph to witness). Does that show the yard?
A. Yes, sir.
Q. Show that to the gentlemen of the jury.

(Witness shows photograph to the jury.)

The Witness: They were working along here, testing the tracks there, and they were putting in the boards, and while we were up there they did not say a word. They would just say, "Look at these damned kids running along there." That is all.

Q. At that time, Hyman, did you know anything at all about electric wires?
A. Yes, sir.
Q. You did?
A. Yes, sir.
Q. How old were you?
A. Fourteen at that time.
Q. You were fourteen years old at that time?
A. Yes, sir.
Q. You knew something about them?
A. Yes, sir.

Mr. Curtis: That is all.
Mr. Carpenter: That is all.

226 HERMAN VOGEL, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Curtis:

—. What is your name?
A. Herman Vogel.
Q. Where do you live?
A. 763 East 152d Street.
Q. How old are you?
A. Sixteen.
Q. Do you work now?
A. Yes, sir.
Q. What at?
A. Stock clerk.
Q. Did you hear about the time that David Frutcher got hurt?
A. Yes, sir.
Q. And do you know this bridge?
A. Yes, sir.
Q. On which he got hurt?
A. Yes, sir.
Q. How long did you know it before the day he got hurt?
A. About a year and a half.
Q. And during that year and a half and before, did you ever climb up on that bridge?
A. Yes, sir.
Q. About how many times do you think you climbed up there? About? Of course, I know you cannot tell me exactly.
A. About ten or fifteen times.
Q. What did you climb up there for?
A. Well, to have some fun, to play tag up there.
Q. And other boys climbed up at the same time?
A. Yes, sir.
Q. Did anybody ever tell you not to go up on the bridge?
A. No, sir.
Q. At any time that you were up on the bridge, did you see any men working around the bridge?
A. Yes, sir.
Q. Where were they?
A. Where the tracks are.
Q. Tell the jury how you used to get up on the bridge?
A. Can I have the picture?
(Witness indicates to jury.)

227 Q. At that time did you know anything about electric wires at all?
A. No, sir.
Q. You did not know live wires or dead wires, or any other kind of wires?
A. No, sir.
Mr. Curtis: That is all.

Cross-examination of Herman Vogel.

By Mr. Carpenter:

Q. Did you go up the lattice work, or up the incline on the bridge? Do you know what the lattice work on the bridge is?

A. Yes, sir.

Q. I asked you, did you go up the lattice work?

A. Yes, sir.

Q. You did not use the incline at the end of the bridge, but you used the lattice?

A. Yes, sir.

Q. When you reached the top of the lattice, how did you get from there to the top of the bridge?

A. I got my hand up on top of the bridge there, and then I shinnied my way up.

Q. About how far would you have to shinny?

A. About three feet.

Q. And then you would get up to what, do you remember?

A. We stood up on that piece of iron, on top, laying flat.

Q. On top of the girder you mean?

A. Yes, and we would stand up there, and all the boys would be playing tag, all over the top of the bridge, and we would run after each other, over on top of the bridge.

Q. If you would run over those girders you would not have anything to hold on to at all?

A. No, sir.

Q. How long had you been doing this?

A. For a year and a half after David Fruchter was hurt and before it.

228 Q. Did you go up there and play that way when there were no cops there?

A. Whenever any of us would see a cop, they would holler, "Chese it, the Cop," and we would all run off.

Q. Did you stay up there when you saw any workmen working on this particular bridge itself?

A. Yes, sir.

Q. How many men have you seen working on the bridge?

A. On the bridge? Not on the bridge. Under the bridge.

Q. On the bridge.

A. About three or four men were there.

Q. When was that?

A. When I was on the bridge playing with the fellows.

Q. How many times did that happen?

A. I saw them about three times when I was on there.

Q. Where were they, what part of the bridge?

A. Where the freight trains are.

Q. What is that?

A. Where the freight trains are.

Q. Why, there are not any freight trains on this bridge, are there?

Mr. Curtis: He said under the bridge.

Q. To make it clear, so there will be no misunderstanding, you did not play up on the bridge, when the men were working on the bridge itself?

A. No, sir. I said when the men were working under the bridge.

Q. Under the bridge?

A. Yes, sir.

Q. You have seen men working on the bridge, haven't you?

A. Not on the bridge, under the bridge.

Q. I am not talking about when you went up there, but had you ever seen men working on the bridge itself?

A. No, sir.

229 Q. There never happened to be any men working there when you were there?

A. No, sir, I never saw anybody working on the bridge.

Q. You never saw anybody working on the wires, or near the wires?

A. No, sir.

Q. When you got up on top of the girders, did you climb up into the superstructure, that held the wires above the top of the bridge?

A. No, sir.

Q. You did not?

A. No, sir.

Q. You kept away from those, did you?

A. Yes, sir.

Q. You knew the wires were there?

A. I knew the wires were there.

Q. That is the reason why you kept away from that superstructure?

A. Yes, sir.

By Mr. Curtis:

Q. Did you know anything about the wires?

A. I knew live wires.

Q. Did you know anything at all about electricity at that time?

A. No, sir.

Q. At that time you knew nothing about the wires, or about wires of any kind, is that right?

A. Yes, sir.

By Mr. Carpenter:

Q. When you started to say you knew about live wires to Mr. Curtis, what did you mean?

A. I heard people speak about live wires, and I always made it my business to stay away from any kind of a wire, whether it was a live wire or not.

Mr. Carpenter: That is all.

230 LEON POSNER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Curtis:

Q. What is your name?
A. Leon Posner.
Q. Where do you live?
A. I live now at 637 Clinton Avenue, in the Bronx. At the time of the accident I lived in 626 Concord Avenue, just one house away.
Q. What is your business?
A. My business is a chauffeur.
Q. For whom?
A. I am not working just now.
Q. Who did you work for last?
A. Rosner & Cantor.
Q. Who are they?
A. A candy firm.
Q. Did you hear of the time when David got hurt?
A. Yes, sir, I did hear about it.
Q. Do you know this bridge at 149th Street?
A. I do.
Q. Did you know the bridge before David got hurt?
A. I knew the bridge before he got hurt.
Q. And before he got hurt, did you ever see any boys climbing up on it, and playing around it?
A. Yes, I saw lots of boys playing around it.
Q. For how many years before the accident?
A. About two or three years before the accident.
Q. You saw lots of boys playing up on the bridge?
A. Lots of boys went up on the bridge.
Q. How old are you?
A. Nineteen years of age.
Q. I suppose these boys were small boys and big boys, different sizes?
A. Yes, different sizes.

Mr. Curtis: That is all.

231 Cross-examination of Leon Posner.

By Mr. Carpenter:

Q. When you went up there, Mr. Posner, how did you go up?
A. How did I go up?
Q. Yes.
A. Those beams, the girders, the incline, this way, it inclines about 45 degrees, and I always used to climb up there.
Q. You mean where the lattice work was?
A. I mean where the lattice work was.

Q. And you went up the lattice work?
A. Yes, sir.
Q. Until you got to the top of the lattice work?
A. Yes, sir.
Q. Then what did you do?
A. Then I would go up around the top, and climb up to the top, and then go down.
Q. But where there was no lattice work to carry you up further, how did you go?
A. I used to go up like this (indicating) and then slide down.
Q. You used to shinny up, as the other boys did?
A. Yes, shinny up.
Q. Had you ever gone up on the end of the bridge where the incline was?
A. Yes, I have been up there.
Q. Which is the easier way, to go up the incline or to go up the lattice work?
A. Up the incline.
Q. You tried both ways, and that is the easiest?
A. Yes, sir.
Q. When you got up there on the top girder, had you ever climbed up into the superstructure, that holds these wires up?
A. When you get up to the top——

Mr. Curtis: Yes or no.
The Witness: Yes, sir.

232 Q. You have done that?
A. Yes, sir.
Q. Have you done that many times?
A. No, just a few times.
Q. How high did you go up?
A. To the top.
Q. You went up past the wires?
A. Not past the wires.
Q. What?
A. Just underneath the wires.
Q. Did you climb up into the superstructure that holds the wires up?
A. There is one beam that the wires are suspended on, and that beam I never climbed up there. I never climbed up there. But you hold it, when you climb up.
Q. I cannot hear you.
A. I climbed up here to the top where it is level (indicating).
Q. You went to the top of the girders?
A. Yes, sir.
Q. Of the bridge proper?
A. Yes, sir.
Q. Then what did you do?
A. I sat up there for a couple of minutes, and then I would go down and go home, that is all.

Q. So then, as I understand it, you did climb up into the lattice work, above the top of the girders that support the wires?

A. I am trying to tell you there was a beam, all going up, and the wires were suspended on that, and that was as far as you could go.

Q. I am talking about the wires that are on top of the bridge. I am talking about these wires that run along on top of the bridge. Did you climb those that support the wires?

A. No, just sit on top there, see?

Q. If I understand you correctly, you say you never did climb these poles where the wires were?

A. I never did climb those poles.

Q. Did you ever climb up there when there were any men
233 working on the bridge itself?

A. Yes. If the men were working there, we used to go up, if there was men around on there.

Q. How many times did you go up?

A. About two or three times, that is all.

Q. Were you ever chased away by men or policemen there?

A. I was never chased away.

Mr. Carpenter: That is all.

Mr. Curtis: That is all.

MORRIS NEIDENBERG, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Curtis:

Q. What is your name?

A. Morris Neidenberg.

Q. Where do you live?

A. 818 East 166th Street.

Q. Where do you work?

A. Plumber's helper.

Q. How old are you?

A. Nineteen.

Q. So that when this accident happened, you were at that time about fifteen years old?

A. Fifteen years old.

Q. Where did you live?

A. I lived at 726 East 151st Street.

Q. About how far is that from this bridge?

A. About seven blocks.

Q. You heard of it the day David got hurt?

A. Yes, the same day.

Q. You heard about it?

A. Yes.

Q. Did you ever know this bridge before that?

A. Yes.

234 Q. For how long?
A. For about a year and a half.
Q. And during that year and a half did you ever climb up on this bridge?
A. Yes, I climbed up about three feet.
Q. And did you ever see any other boys climb up it?
A. Oh, yes.
Q. How many times? Many times?
A. Sure.
Q. Previous to that year and a half?
A. Yes.
Q. And during that year and a half?
A. Yes.
Q. During the time you climbed up, or during the time you saw other boys up there, did you see any men around the bridge, and in the railroad yard or where?
A. Yes, underneath the bridge, I seen them working.
Q. At the time you were on the bridge, and when other boys were climbing up there?
A. Yes.
Q. Did anybody ever chase you away, or tell you not to go up on that bridge?
A. Once in a while, when the railroad workers would come out, I would see them.
Q. Did anybody ever run you away or chase you?
A. No.
Q. Did anybody ever warn you not to go on the bridge?
A. Nobody.
Q. How did you used to go up on the bridge?
A. On the bolts.

(Witness indicates it to the jury with the aid of photograph.)

Q. You got up on top?
A. Yes, sir.
Q. What did you go up there for?
A. To try to get some stray pigeons, that were lying around the yard, them wild ones, I see lots of them down there at times.

Mr. Curtis: I think that is all.

235 Cross-examination of Morris Neidenberg.

By Mr. Carpenter:

Q. As I understand it, you did not go up the incline all the way?
A. No.
Q. But after you got up part of the way, you worked around the rear of it, and got up on some of the cross pieces?
A. Yes.
Q. Is that right?
A. Yes.
Q. Did the rivets run up all the way to the top?

A. Yes, sir, they would run all the way up on the top.
Q. But you did not go up that way?
A. No.
Q. What were these men doing that you had seen working down there under the bridge?
A. Under the bridge?
Q. Yes.
A. I seen them fixing freight cars, the wheels, you know.
Q. Was that right under the bridge, or at another place?
A. No, over further, I would see them.
Q. Over by the Oak Point Yards?
A. Yes, all the way down. I don't know what yard it is.
Q. You say you saw these men that were fixing wheels right underneath the bridge?
A. No, not underneath it. Outside.
Q. Is that what you mean when you said you went on the bridge, and saw these men working down below?
A. Yes, they were on freight cars. Turning them wheels, you know.
Q. That was about how far away?
A. That was not far. That was about half a block.
Q. Did you ever go up on the bridge when anybody was working under it?
A. No, never.
Q. The reason you did not do that, was because you were afraid they would chase you off?

236 Mr. Curtis: I object to that as incompetent, irrelevant and immaterial, and as having no weight or bearing upon this plaintiff.

The Court: This boy is testifying what he has done, how he got up there, and all about it. It applies to this time, and to this boy. It may not apply to the boy, but it is simply this witness' testimony, to show he was susceptible of noticing the facts.

Mr. Curtis: That is all.

The Court: As to whether or not he was chased away, and whether or not he was afraid when he was up there, may be proper cross-examination though, and I will overrule the objection.

Mr. Curtis: All right.

Q. As I understand it, you did not go up when any men were there?
A. I did not see any men up there while I went up there. At the time I was up there, I did not see anybody up there.
Q. Before you went up there, you took the precaution to see if anybody was up there?
A. Once in a while, a policeman on a bicycle would come around.
Q. And when you saw him you would not go up?
A. Then I would walk right past him, and go swimming.
Q. But when the policeman was there, when there were any men on the bridge, then you would not climb up?

Mr. Curtis: I object to that, because he stated distinctly he never was there when there were any men on the bridge.

237 The Court: He can answer that he never went up there when there were men on the bridge.

The Witness: No, I would not go up there if there was anybody up there.

Q. In other words, you knew that you had no right to go up there, didn't you?

Mr. Curtis: That is objected to as incompetent and immaterial, and in no way binding on this plaintiff.

The Court: It is not binding on this plaintiff?

Mr. Curtis: It is not binding, necessarily, except to show that others went there.

The Court: Objection overruled.

Mr. Curtis: Exception.

A. Yes, sir.

The Court: What is your age?

The Witness: Fourteen or fifteen.

Q. Did you or didn't you?

The Court: He said he did not. I do not suppose any of them believe they had any business up there.

Mr. Curtis: The point is, your Honor, that a seven-year-old boy would not know it.

The Court: The jury knows the difference in their ages. The mother has testified that this plaintiff was seven years old, and this boy has said he was fourteen or fifteen, and the processes of his mind would not be ordinarily those of a boy of seven, nor would a boy of seven have the same influences, or actuating motives, as the

238 other boy, but that is all a matter for the jury. Go on with your questions if you have any more.

By Mr. Curtis:

Q. Well, did you ever see any men on the bridge at the time you went up there?

A. No, never.

Q. Morris, near that bridge, in that open space that was talked about, in the spring and summer, was there a crowd of boys around there every day?

A. In the warm weather there was, sure.

Q. What?

A. There was lots. There was mobs.

Q. There was mobs around?

A. Yes.

Q. There were ball games going on there and all that?

A. Playing, and catching ball, and all playing ball.

Q. There was always quite a crowd, or quite a mob, as you call it, of boys near this bridge?

A. Yes, coming home from swimming.
Q. And boys playing catch ball, and so forth?
A. Yes.

Mr. Curtis: That is all.

By Mr. Carpenter:

Q. Where were they playing ball?
A. Right about here (indicating on photograph). With soft balls, having a catch.
Q. There were open lots on either end?
A. Yes, all open. There is no houses on either side. I think in this place there is, about two blocks away (indicating).
Q. But within a space of two blocks, it is all open country?
A. On this side it is all open country.
Q. And on the other side too?
A. Yes.

Mr. Carpenter: That is all.

The Court: You probably could produce every boy of that
239 age in the Bronx on this question, couldn't you?

Mr. Curtis: Pretty near.

The Court: What is the necessity of it? It is all cumulative, but put this witness on the stand, and let us get through with him.

MAX GLASSER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Curtis:

Q. What is your name?
A. Max Glasser.
Q. Where do you live, Max?
A. 753 East 151st Street, Concord Avenue.
Q. Do you work, now, Max?
A. Yes, sir.
Q. How old are you?
A. Fifteen.
Q. What do you work at?
A. Bookbinder, Collier's Magazine Company.
Q. Do you know this bridge?
A. Yes, sir.
Q. Did you know it at the time David got hurt?
A. Yes, sir.
Q. Did you know it before that?
A. Yes, sir.
Q. For how many years?
A. About eight years ago.
Q. Before he got hurt?
A. Yes, sir.

Q. When David got hurt, you were about eleven or twelve years old, is that right?
A. Yes, sir.
Q. And before David got hurt did you ever climb up on that bridge?
A. Yes, sir.
Q. For how many years did you climb up on the bridge?
A. I cannot remember.
240 Q. But two, three or four years, I don't care?
A. About three and a half years ago.
Q. When you say three and a half years ago, you mean before he was hurt?
A. Yes, sir.
Q. How did you climb up?

(Witness shows his method to the jury with the aid of the photograph.)

Q. And you used to climb up there for two or three years before this happened?
A. Yes, sir.
Q. Did you see other boys climbing up?
A. Yes, sir.
Q. What did you climb up for?
A. We used to play "Follow the Master."
Q. Somebody would climb up there first, and would do some stunts, and you would do the same stunt?
A. Yes, sir.
Q. Or he would be stuck for the ice cream?
A. Yes, sir.
Q. Is that it?
A. Yes, sir.

Mr. Curtis: That is all.

Cross-examination of Max Glasser.

By Mr. Carpenter:

Q. After you got up on top of the bridge, did you go into the superstructure that holds the wires, did you go into this structure that held the wires above the bridge?
A. This way, I used to go on here.
Q. That is, on the top of the bridge proper?
A. Yes, sir.
Q. I am asking you about that part of the steel structure, that was up above the top of the bridge, did you ever climb up into that?
A. No, sir.
Q. You knew the wires were there?
A. Yes, sir.
241 Q. That is the reason you did not go up there, wasn't it?

Mr. Curtis: Objected to.
The Court: Objection overruled.

The Witness: Yes, sir.
Q. Why didn't you go up into the superstructure then?

Mr. Curtis: That is objected to.
The Court: He said he did not go. Ask him the reason why.
Mr. Carpenter: That is what I want to ask him.

Q. Why didn't you go?

Mr. Curtis: That is objected to because it calls for the operation of the witness' mind, and on the ground that it is not binding on the plaintiff.
The Court: It brings out whether or not he knew the danger.
Mr. Curtis: I want to show that this boy was five years older than the boy who was hurt.
The Court: As I say, I see no purpose in this testimony at all, except to show that boys could get up there and did get up there.

Q. Why didn't you go up in the superstructure where the wires were?
A. I did not go up there because the leader did not go up there. We were playing "Following the Master," and we had to follow the master.
Q. Did you ever go up there when you did not play "Follow the Master"?
A. Sometimes.
Q. When you were not playing "Follow the Master," why didn't you go up into the structure where the wires were?
242 A. I went up there for the bird's nest that time.
Q. The bords' nests were not up there?
A. No, they were right over there (indicating).
Q. Where were the birds' nests?
A. Right over here (indicating).

(Witness illustrates to the jury.)

Q. Did you ever go up on top of the bridge when you did not go up to find birds' nests, or when you were not playing "Follow the Master"?
A. No, sir.
Q. You never did?
A. No, sir.
Q. You knew those wires were live there, didn't you?
A. I knew they were live, but I did not know what it meant.
Q. You say you do not know what it means to say the wires are live?
A. No, sir, I did not know what it meant.
Q. What did you think I meant when I said "You knew the wires were live," and you said, "Yes"?
A. I said no.
Q. Did you know at that time that those wires were live?
A. I did not know what it meant.
Q. You did not know it?

A. No, sir.
Q. You are sure of that, are you?
A. Yes, sir.
Q. What do live wires mean?

Mr. Curtis: We object to what he may know now.
The Court: Allowed.

Q. Tell us what live wires mean?
A. Now?
Q. Yes, now, or at any time?

Mr. Curtis: I object to that. He says he did not know what they meant at that time.
243 The Court: He asked him whether he knows what it is.
Mr. Curtis: Now?
The Court: Yes. Just answer whether you know what it is now.
The Witness: Yes, sir, I know what it is.
The Court: What is it?

Q. What is a live wire?
A. The current of electricity goes through it.
Q. How long have you known what a live wire is?
A. Well, since I was about thirteen and a half years old.
Q. Have you ever climbed up that bridge when there was any policeman there?
A. No, sir.
Q. Or when there were any men working under it?
A. When they were down below in the yard.
Q. I am talking about men working on the bridge, not about men working in the yards. Did you ever climb up on the bridge when men were there working on the bridge?
A. No, sir.
Q. You looked around to see that they were not working on it, before you went up, did you?

Mr. Curtis: I object.
The Court: I will allow it.

Q. Before you went up did you look around to see that there was any policeman there, or that there was anybody working on the bridge?

Mr. Curtis: I object to it as manifestly incompetent.

The Court: What difference does it make? Where is the materiality?
Mr. Curtis: I do not know as it makes any difference.
The Court: Except that a boy might appreciate it, that these people would bring him down. That others got up, is
244 shown from the testimony.
Q. Did you?
A. I did not hear what you said.
Q. Did you go up there?
A. Sure.

Q. Without looking to see that a policeman or other men were there, working on the bridge?
A. Yes, sir, I went up there. I did not look around.
Q. Did you usually look around to see whether there was anyone around there?
A. No, sir.
Q. You did not care whether the police officer was there or not, did you?
A. If I climbed up and seen him, I climbed down again and run.
Q. If you saw men working on the bridge, did you go up there?
A. If they did not chase me I would not go away.
Q. Did they ever say anything to you?
A. No, sir.
Q. Do you contend to this Court and jury——

The Court: It is not what he contends. Just ask him what he did or did not do.

Q. Did you regard, at the time that you went up on the bridge, that you had a right to go up there and play?

Mr. Curtis: That is objected to as incompetent, irrelevant and immaterial, and is not binding on the plaintiff.
The Court: Objection overruled.
Mr. Curtis: Exception.

Q. Tell us what your state of mind was on that, please.

The Court:

Q. Do you think you had a right to be up there, or did you know you were taking a chance?
A. There was no sign on the top, and I thought that it meant you couldn't go in the yards.
245 Q. Didn't you think there was no danger of arrest on top there?
A. There was no sign up there.
Q. Did you see the wires up there?
A. I didn't know whether they were live or not.
Q. Would you take a chance when you didn't know whether they were alive or not?

Mr. Curtis: I object.
The Court: Objection sustained. That is argument, and he is not an expert.
Mr. Carpenter: I admit that, but I certainly have the right to know what the state of mind of the boy is.
The Court: What did you say your age was when you were up there?
The Witness: My age?
The Court: Yes, when you were up there.
Mr. Carpenter: He was eleven years old when this accident happened.
The Court: I suppose if the jury must know from the testimony,

which came through every one of these boys, that they were trespassers. That is, they knew they had no right up there, but if the invitation to go up there was such that they went up there, and if they saw a cop they slid down, that is perfectly natural. Is there anything unusual or unnatural about that? But still, they went there, and there was nothing to prevent them, according to your theory, from getting up there. Go on with your examination.

Q. You knew then, didn't you, that you had no right to go up on the bridge?

Mr. Curtis: I object to that as already answered.

246 Mr. Carpenter: You objected before, and he did not answer.

The Witness: What was the question?

The Court: Were you afraid of anybody getting after you, when you went up there?

The Witness: If I had seen a policeman I would not have gone up there.

The Court: That is what his state of mind was. How much more? How many more have you, on this line?

Mr. Curtis: I do not think I will bring any more on that line, but I think I will call a couple of adults, and the young boy himself.

The Court: That will end your case?

Mr. Curtis: Yes, sir.

The Court: Gentlemen of the jury, in allowing you to separate, it will be your privilege, and the Court tells you that it is, but you are prohibited from discussing the case among yourselves, out of Court, or to permit anybody to talk to you about it. You are here now just to hear what comes from these witnesses, and to decide the case upon the testimony, and not from any knowledge that somebody volunteers to you on the outside. That would be contempt of Court, if anybody attempted to approach you, or to tell you anything about it, or to discuss it with you, and refrain as far as you can from coming to any opinion on the testimony until you have heard all the evidence, and the case is finally submitted to you. You may go until 10 o'clock tomorrow morning.

Adjourned to Wednesday, August 18, 1920, at 10 o'clock a. m.

247 New York, August 18, 1920.

SAM FRUCHTER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Curtis:

Q. What is your name?
A. Sam Fruchter.
Q. Mr. Fruchter, you are the father of David Fruchter?
A. Yes, sir.

Q. Do you remember the time that David was hurt?
A. Yes, sir.
Q. Do you know when he was hurt?
A. Yes.
Q. And do you remember that he had a doctor?
A. Yes, sir.
Q. And do you know how long that doctor came to see David?
A. About four months. May be more.
Q. About how many times, every day or every two or three days?
A. Every two days.
Q. About how much did he get? What was his bill for each visit?
A. Two dollars a visit
Q. What is -our business?
A. I work by shirts.
Q. You are a workman on shirts?
A. Yes.
Q. And at the time that this accident happened, how many children were there in your family?
A. Seven.
Q. What were their ages, do you remember?

Mr. Carpenter: I object to this, your Honor.
The Court: That goes as to the care of the mother.

Q. Did you have any servants in the house?
A. No.
Q. You went to work every day?
A. Yes.
248 Q. Did you have any children at that time that were younger than David?
A. Yes.
Q. Did you have a child younger than David?
A. Yes.
Q. What was that child's name?
A. Max.
Q. How much younger than David was Max?
A. One year.
Q. One year younger?
A. Yes.

Mr. Curtis: That is all.

Cross-examination.

By Mr. Carpenter:

Q. How long had you lived there in that neighborhood, Mr. Fruchter, in that same place?
A. About six years.
Q. Are you familiar with the bridge on 149th Street?
A. No.
Q. Do you know where the bridge is at 149th Street?

A. I don't know.
Q. Do you know there is a bridge at 149th Street?
A. No.
Q. You do not even know there is a bridge there?
A. I do not see the bridge.
Q. What?
A. I cannot go.
Q. Do you tell the jury that you don't know now that there is a bridge at 149th Street?
A. No.
Q. Do you know now?
A. No.
Q. Do you know your son was hurt on the bridge at 149th Street?

Mr. Curtis: He says he don't know, of his own knowledge. He says he never saw the bridge.
The Court: He says that.
Mr. Carpenter: Does your Honor permit me to ask the question.
The Court: I will allow the question.
249 Q. You may answer the Court says.

The Court: Do you know that your son was actually hurt on that bridge?
The Witness: I know. I know——
Q. Yes or no, do you know?
A. I don't know what to say.
The Court: Did you know that your son was hurt on this particular bridge in question?
The Witness: I know.
Q. So you do know there is a bridge there, don't you?
A. No.
The Court: Did you ever see the bridge?
The Witness: I never see the bridge.
Q. Do you know how far it is away from your house? Do you understand what I say?
A. No.
Q. You do not understand?
A. No.

Mr. Carpenter: Well, your Honor, may be that is the trouble. Your Honor, he does not understand.
The Court: He got along very well with the plaintiff's counsel.
Mr. Carpenter: Apparently he did.
The Court: May be he does not hear you. Come a little closer.

Q. Do you know how far that bridge is from your place?

Mr. Curtis: He says he never saw the bridge. How could he know.
The Court: He should answer that he does not know.
(To the Witness:) You never saw the bridge, and you do not know how far it is?
The Witness: I do not see, the bridge, never.

The Court: You do not know?
The Witness: No.

250 Q. Have you ever seen it from your house, or in going up and down the Southern Boulevard?

A. No.
Q. Where did you live in 1916, with respect to the Southern Boulevard? Were you near it or not? Well, in 1916, did you live near the Southern Boulevard?
A. No, I live in Concord Avenue.
Q. Yes, but does Concord Avenue run near the Southern Boulevard?
A. I don't know.
Q. Why, Mr. Fruchter, you know where the Southern Boulevard is? Isn't it right near your home?
A. I don't know. I work, see, down town. I don't know.
The Court: You don't know what they call the Boulevard?
The Witness: No.
The Court: What is the Boulevard?
The Witness: I don't know.

Q. Why, isn't it the main street, the biggest street, the Main Street in your section there?

The Court: He says he does not know what the Boulevard is.
Mr. Carpenter: I change it now. I asked him if it is not the main street.

Q. Isn't it the principal street?

The Court: What is the big street called up there by you? The big wide street?
The Witness: I don't know.

Q. In order to go to your house on Concord Avenue, do you have to pass 149th Street?
A. No.
Q. When you come up from downtown?
A. I come up from downtown with the subway.
Q. But does not that run by 149th Street? Isn't there a station there?
A. I stop in Jackson Avenue, that is all.

251 It is stipulated that the witness lives eight blocks from the bridge on the north side of it.

Q. Is there any doubt about the bridge?

Mr. Carpenter: There is no doubt about the bridge. It is there. I do not contend it is not there, but I contend I have a right to find out what he knows about it, and if he says he does not know anything about it, I have the right to cross-examine him.
The Court: He is not the plaintiff.
Mr. Carpenter: He is his father.
The Court: Well, go on. You have the right to cross-examine

him on all matters that have been gone into on the direct examination.

Mr. Carpenter: Isn't the possible contributory negligence of this witness material? That is our contention.

The Court: In the negligence conduct of the child?

Mr. Carpenter: Yes, sir.

The Court: Yes.

Mr. Carpenter: Then I am asking him about this locality.

The Court: Go on.

Q. Don't you know that, in order to go to your home, don't you know that you have to go by 149th Street? Haven't you ever walked by 149th Street on the Southern Boulevard?

A. No.

Q. Can't you, when you walk by 149th Street on the Southern Boulevard, see that bridge?

A. I do not walk in that way.

Q. Do you know that this is all an open country around that bridge?

A. I don't know.

252 Q. Do you say that you never walked by 149th Street?

A. Never.

Q. Why do you answer before I finish? Do you say that you never walked by 149th Street on the Southern Boulevard? Do you know what I ask you?

A. No.

Q. What did I ask you?

A. I did not understand.

Mr. Carpenter: Then I submit, your Honor, we had better have an interpreter.

The Court: What language do you speak?

The Witness: Jewish. Yiddish.

The Court: Call up some of these boys here, that speak Yiddish.

(Isador A. Rabinow was then duly sworn as the official interpreter.)

Q. (To the Interpreter:) Now, can you tell us where your home is, with reference to 149th Street and the Southern Boulevard?

A. It is about eight blocks from my home, to the Southern Boulevard.

Q. On which side of the Southern Boulevard are you as you go from down town up? *On* you on the right or left?

A. I cannot say this, because I am not in the neighborhood, because I am not very acquainted with the neighborhood.

Q. You can tell us, can't you, whether it is on the right hand side or on the left hand side of the Southern Boulevard?

A. No, I cannot say, because I am not acquainted. I don't know.

Q. If you know it is within eight blocks of the Southern Boulevard, can't you tell us on which side it is?

A. I asked my little boy, and he tells me that it is eight blocks.

Q. Have you ever walked along the Southern Boulevard past 149th Street?

A. No.

253 Q. And you tell the jury that you do not know where this bridge is, and never saw it?

A. I have never seen it, because I come late from down town. I do not go near there. I come late from down town, from my work, I come very late.

Q. And you never went out in that neighborhood at all, where the bridge is?

A. No, sir.

Q. Even after your boy was hurt, you never went near the bridge?

Mr. Curtis: Your Honor, that is improper, irrelevant and immaterial, and I object to it as subsequent to the accident.

The Court: That is going into the facts, whether he knows the location of the bridge. Allowed.

The Witness: I cannot go there because I am too nervous, and I cannot go even near there.

Q. Did you ever talk with your boy that got hurt about this bridge or any bridge?

Mr. Curtis: I object to whether he had or not, as hearsay.

The Court: That would be hearsay.

Mr. Carpenter: It would depend and bear on the question as to what care he had taken with respect to his boy.

The Court: It goes to something that he understood from the boy after the injury?

Mr. Carpenter: Oh, no, I mean prior to the accident, and prior to the injury, if he had ever talked with him.

The Court: He wants to find out whether he does or not. The witness is not conclusive on that at all. Allowed.

Q. Did you ever talk with your boy that got hurt about this bridge or any bridge?

A. No.

254 Q. You never told him to keep off of any bridge or bridges?

Mr. Curtis: I object to that as highly improper

The Court: Allowed.

The Witness: I never expected any such thing.

Mr. Carpenter: I move to strike out as not responsive.

The Court: Well, I don't know whether it is or not. I will let it stand as his answer. Allowed.

Mr. Carpenter: Exception. I move to strike it out on the ground that it is not responsive.

The Court: Objection overruled.

Mr. Carpenter: Exception.

Q. Will you kindly answer the question? Did you ever talk with him about going on bridges?

Mr. Curtis: That is objected to as already answered, two questions before. It is the same question.

The Court: Objection overruled.

The Witness: No.

Q. All right. Thanks. Now, have you ever talked with him about going on other people's property?

Mr. Curtis: To that we object, as beyond the scope of this examination.

The Court: Objection sustained. It should be simply about whether he had warned him about this particular practice at this particular place.

Mr. Carpenter: If he has not cautioned him about the bridge and the wires, the only thing I can do next is to find out if he
255 ever cautioned him about going on other people's property. I submit it is cross-examination. They produce him here for the purpose of showing himself free from contributory negligence.

Mr. Curtis: We produce him for the mother. He is away all day long.

The Court: Objection sustained.

Mr. Carpenter: Exception.

Q. Had you ever warned him to keep away from any electric wires?

Mr. Curtis: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Curtis: Exception.

A. Since I never expected that such a thing might happen. He was always in the house.

Q. I did not ask you whether you expected it. Did you ever do it? Did you ever talk to him?

A. Never.

Q. Did you ever warn him to keep off the streets?

Mr. Curtis: That is objected to as incompetent, irrelevant and immaterial.

Q. And not play on the street?

Mr. Curtis: That is objected to. The streets are free. They do not belong to the railroad or to anybody else.

Mr. Carpenter: I concede they do not belong to the railroad.

Mr. Curtis: One would have presumed that they did.

The Court: I should think myself the pedestrians had the right to use the street.

Q. I will put it this way. Have you ever had occasion—
256 have you ever cautioned him about playing on the street?

Mr. Curtis: That is objected to.

The Court: Allowed.

The Witness: I never did see him. I used to go to work in the morning, and come back at night from work.

Q. You mean you never talked with your boy at all?

A. Yes, I talked to him, but not on such things

Q. That is what I wanted to know. What time do you go to work in the morning, and what time do you quit?

A. I leave at 6:30 a. m., and when I come home at night, at 8 o'clock, I generally find him asleep.

Q. That is so even today, is it?

Mr. Curtis: I object to that as incompetent, irrelevant and immaterial. I object as to what is true now, four years after.

The Court: Objection sustained.

Mr. Carpenter: Exception.

Q. Was *he* true, when he was seven or eight years old, that he was asleep at 8 o'clock at night?

A. Yes, I used to find him asleep.

Q. And even after this accident you never——

Mr. Curtis: I object to that as incompetent, irrelevant and immaterial, as to anything after it, and counsel well knows it.

The Court: It would not be competent, if he changed his whole plan.

Mr. Carpenter: I would like to know what degree of care he exercised.

The Court: If he changed it afterwards, that would not affect it at all.

Mr. Carpenter: Exception. That is all.

257 Redirect examination.

By Mr. Curtis:

Q. Before this accident, did anybody ever tell you that the New York, New Haven & Hartford Railroad Company had a bare wire, carrying 11,000 volts over this public bridge?

A. No.

Q. Did you ever know that before the accident?

A. No.

Mr. Curtis: I thought not. That is all.

Recross-examination.

By Mr. Carpenter:

Q. Did you ever see any wires on any bridges, in any part of the City of New York before this accident?

Mr. Curtis: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.
Mr. Curtis: Exception.

The Witness: I did not go looking, because I have no time for these things.

Q. You mean to tell the Court and jury that even before the accident you did not know whether there were any wires over any bridges in the City of New York, because you did not have time to look?

A. Yes, I knew there were wires.

Q. Of course you did. Now, did you ever tell your boy anything about those wires that you have in mind?

Mr. Curtis: That we object to. There is no telling where they are.

Mr. Carpenter: It does not make any difference where they are.

Mr. Curtis: I submit it does.

The Court: Why?

Mr. Curtis: If it was down here in Chambers Street, the
258 boy would hardly get to it, if he was up in the Bronx.

The Court: In other words, to show whether or not the boy had any idea of the danger of the wires about which he had been told?

Mr. Curtis: He has already answered it.

The Court: Allowed.

Q. Did you ever tell your boy anything about those wires that you have in mind?

A. No.

Mr. Carpenter: That is all.

Re-redirect examination.

By Mr. Curtis:

Q. You never saw any wires except in the subway, did you, where you travel?

Mr. Carpenter: I object to that as incompetent, irrelevant and immaterial.

The Court: I withdraw it. It is just to show you how foolish you are, that is all.

If your Honor please, it is conceded that the photographs offered by the plaintiff, Exhibits Nos. 1 and 2, were taken in July, 1919. Your Honor sees the point of that. Our officer testified the bridge was the same at the time of the accident, except that there were not the signs on the top.

The Court: Yes.

Mr. Curtis: If your Honor please, I want to ask this boy one question. I understand he said something yesterday that did not get on the record in the presence of the jury.

The Court: Has he given the jury some information on the outside?

Mr. Curtis: Oh, no; when he was over here, with the picture.
The Court: Recall him.

259 HYMAN WOHL, recalled.

Direct examination.

By Mr. Curtis:

Q. Mr. Wohl, you were asked yesterday some questions with regard to seeing people in and around the railroad track at any time that you were on the bridge?
A. Yes, sir.
Q. Do you remember that?
A. Yes, sir.
Q. I understand that in describing the picture here yesterday, at the rail, to the jury, you stated that one of those men had said something that you heard?
A. Yes, sir.
Q. Is that right?
A. Yes, sir.

Mr. Carpenter: I object to what Mr. Curtis understood.

Q. I will follow it up this way. Did any of those men at any time, that you say you saw under the bridge, did any of them at any time say anything that you heard while you were climbing up on the bridge?

Mr. Carpenter: I object, unless it is first shown that those men were employees of the New York, New Haven & Hartford Railroad Company, and were authorized.
The Court: That goes for what it may be worth. If they were men working around, shoveling dirt, and driving stakes, it depends on what they were doing. It may be an inference that they were employees.
Mr. Carpenter: Suppose somebody else was there, and made some remark, would it be binding?
The Court: No. He does not know, but the jury are entitled, from the circumstances shown, to decide for themselves.
260 Mr. Carpenter: May I have an exception, your Honor?
The Court: Yes.

Q. Do you know what the Court says now?
A. Yes, sir.
Q. When did you ever hear any of the men that you saw working the tracks there, say at any time while you were up on the bridge—what did you ever hear them say?
A. "Look at them damned kids on the bridge there." They never chased us or nothing. They just said, "Look at them damned kids."
Q. Did you tell us how they were dressed?
A. Yes, sir.
Q. How?

A. They were dressed with, with a kind of coat, them kind of coats with a gray coats, with a blue stripe in.
Q. What about this part (indicating)?
A. Their pants all oiled up, and all dirty, like a railroad worker.

Mr. Carpenter: I move to strike that out.
The Court: Yes. Strike it out. Just describe what they had on. You cannot say whether they were railroad workers or not. The jury will determine that.

The Witness: They had overalls on.
Q. And their overalls were dirty?
A. Yes, sir.
Q. Do you remember what these men were doing, or do you not?
A. At noon time I seen them walking around with a can, for their lunch.
Q. At the time they said, "Look at those damned kids up on the bridge," what were they doing?
A. They were looking over the tracks, and putting beams under the tracks.

Mr. Curtis: That is all.

261 HYMAN WOHL, recalled.

Cross-examination continued.

By Mr. Carpenter:

Q. How far were they away from the bridge?
—. How far?
Q. Yes.
A. About 50 feet.
Q. Where were you, in what part of the structure were you at that time?
A. On the north side.
Q. On the roadway or up above?
A. On the roadway.
Q. Who was with you at the time?
A. A few fellows from our block.
Q. Well, who? Name some of them.
A. Vogel, and you want to know the other names?
Q. Yes, who was with you at the time this conversation took place?
A. My own brother was with me and another fellow, Posner, who is in the back.
Q. Who else?
A. And one fellow by the name of Frick. That is about all.
Q. Was that before or after the accident?
A. Before the accident.
Q. Do you remember that distinctly?
A. Sir?
Q. Do you remember that distinctly?
A. Yes, sir.

Q. Do you remember the boys who were with you?
A. Yes, sir.
Q. Do you remember the year it was in?
A. Nineteen hundred and fifteen.
Q. Do you remember the month?
A. I don't know the month exactly.
Q. Well, about?
A. I think it was in the vacation time, from school.
Q. In the summer or the winter vacation?
A. Summer time.
262 Q. What time of day was this?
A. It was a dark day.
Q. Not what kind of a day. What time was it that this conversation took place?
A. About two o'clock in the afternoon.
Q. Two o'clock?
A. Yes, sir.
Q. You are sure it was not later?
A. No, sir.
Q. Sure?
A. I cannot tell. Between two or three o'clock.
Q. Where were you going that day?
A. We were going over swimming.
Q. Just crossing over the bridge?
A. No, we stopped, and came up to look for birds' nests.
Q. And when the conversation took place, were you going for these birds' nests?
A. What conversation?
Q. When the men made these remarks, were you going to see the birds' nests?
A. No, not that time. There was a few fellows up there, while I was standing on the bridge.
Q. Who was there, do you remember?
A. Yes.
Q. Tell us?
A. Frick and my brother and Vogel.
Q. You remember the three of them were there?
A. Yes, sir, and a few more.
Q. A few others?
A. A few others that I don't know.
Q. Do you remember who was on the roadway of the bridge?
A. I must have been about the only one. We had a few others, but I don't know. We used to go swimming every day, and I saw them over there.
Q. Were these men who made these remarks east or west of the bridge down below?
A. They were not east or west.
263 Q. What?
A. They were north of the bridge.
Q. North of the bridge?
A. Yes, sir.

Q. You remember that very well?
A. Yes, sir.
Q. Did you make any memorandum of this incident?
A. What?
Q. Did you ever write out this incident that you are now describing?
A. No, sir.
Q. You made no record of it?
A. No, sir, but I remember it.
Q. Do you remember it well?
A. Yes, sir.
Q. How many men made this remark, about those damned kids?
A. I don't know how many men it was. One man made the remark, and they all were listening to him.
Q. How long have you known Fruchter, the boy who was hurt?
A. About six years.
Q. Six years you have known him?
A. Before he was hurt?
Q. Yes.
A. Two years before he was hurt.
Q. When did you first tell this story or make this statement about the men saying to you, when some of them were up on the structure, on this day in 1915, "Look at those damned kids," when did you first make that statement?
A. Where?
Q. When did you first make that statement? When did you first tell anybody that these men said, "Look at those damned kids"?
A. On that day, when he said it.
Q. Who did you tell it to that day?
A. I told it to the fellows who were up on the bridge.
Q. Did you tell anybody after that?
A. No, sir.
Q. You never told anybody?
A. Down at the river, I did.
Q. On that day down at the river you did?
A. Yes, sir.
264 Q. Did you ever tell anybody about it from that time down to the time you took this witness stand here?
A. No, sir.

Mr. Carpenter: That is all.

By Mr. Curtis:

Q. You made mention of it here yesterday, didn't you?
A. Yes, sir.

Mr. Curtis: That is all.

DAVID FRUCHTER, the plaintiff, called as a witness in his own behalf, being duly sworn, testified as follows:

By the Court:

Q. Have you ever been in court before?
A. No, sir.
Q. Do you know what becomes of boys who tell falsehoods?
A. Yes, sir.
Q. You do know?
A. Yes, sir.
Q. What becomes of them?
A. They are punished.
Q. Where are they punished, after they die or before?
A. Before.
Q. They are punished?
A. Yes.
Q. God punished them?
A. Yes, sir.
Q. What becomes of good boys, who tell the truth, and do right in this world? Are they taken care of hereafter?
A. Yes, sir.
Q. Who looks after them?
A. I don't know.
Q. You just said God punishes the bad. What does God do for the good?
A. He looks after them.
Q. He looks after the good?
A. Yes, sir.

The Court: Hold up your hand, and—You know if you hold up your hand, and then go on and tell what is not so, that there would be bad treatment for you hereafter?

The Witness: Yes, sir.
The Court: Very well. Swear him.

Direct examination.

By Mr. Curtis:

Q. What is your name?
A. David Fruchter.
Q. Now David, if you do not understand me, you say so, won't you?
A. Yes, sir.

The Court: You will have to speak pretty loud.

Q. Now David, do you remember the day you got hurt?
A. Yes, sir.

The Court: I would suggest that you make the questions short and simple, and do not go into long preambles. Ordinarily, hardly

any man is intelligent enough to follow the questions I hear asked here in nearly all the cases. They have a preamble like the Declaration of Independence.

Q. Did your mother let you go down in the street that day?
A. Yes, sir.
Q. What did she say to you?
A. Stick around the block.
Q. Did she give you anything?
A. Yes, sir.
Q. What?
A. Two cents.
Q. To do what with?
A. To buy candy with.
Q. And she told you to stick around the block?
A. Yes, sir.
Q. After you went in the street what did you do? After you went down in the street, did you stay there, or what did you do?
A. I stayed there for a little while, until they asked me to go swimming.

By the Court:

Q. Then what did you do?
A. Then we went to the river.
266 Q. I will ask this boy, because he can understand me better than he can you. I am right here.

Mr. Curtis: Yes, sir.

Q. Where did you go when you decided to quit sticking around?
A. To the river.
Q. Did you go straight to the river?
A. No, sir.
Q. Where did you stop?
A. We stopped at the bridge.
Q. What bridge, son, do you know? Can you tell what bridge, across what street, and where it is?
A. Austin Place.
Q. Let us have the photograph. You say you stopped at a bridge?
A. Yes, sir.
Q. Look at this and see if that looks like the bridge?
A. Yes, sir.
Q. Is that a picture of the bridge you stopped at?
A. Yes, sir.
Q. How long did you stay there where you stopped?
A. About half an hour.
Q. What did you do at the bridge?
A. I climbed up for a pigeon's nest.
Q. You climbed up to a pigeon's nest?
A. Yes, sir.
Q. Where was the pigeon's nest?
A. Under the——

Q. Well, was it up in the bridge?
A. Yes, sir.
Q. How much climbing did you have to do to get up there? How high did you go?
A. About 25 feet.
Q. How did you get up there?
A. By irons sticking out.
Q. You did what?
A. There were some irons sticking out.
267 Q. What they call a kind of a lattice work, a trellis?

Mr. Curtis: I do not think he knows what your Honor means.

Q. Did you go up on this, or did you go up on those things that come in that way, and make a kind of a wire mesh? (Indicating to the witness on photograph.)
A. Round things.
Q. Did you go up on the outside or on the inside, how did you climb up on that trellis?
A. I went from the inside.
Q. What did you do when you got up to the bridge next?
A. One of the birds were on the wire, and I climbed up the pole, and I was going to grab the bird, but it flew away, and I grabbed the wire.
Q. You grabbed at the bird and it flew away?
A. Yes, sir.
Q. And you grabbed the wire?
A. Yes, sir.
Q. What sort of a pole was that you say you went up? Was that on top of the bridge?
A. Yes, sir.
Q. After you got up on the bridge, you still went up the pole?
A. Yes, sir.
Q. That pole led up to the wires?
A. Yes, sir.
Q. How high was that pole? How high did you climb that pole?
A. About three feet.
Q. About three feet?
A. Yes, sir.
Q. Well, when you grabbed the wire, what happened, do you know?
A. A pain, and that is all I know.
Q. That is all you remember?
A. Yes, sir.
Q. That is the last you remember?
A. Yes, sir.
Q. You don't know whether you fell or not?
A. No, sir.
268 Q. When did you come to, when did you regain consciousness?
A. A few days afterwards.
Q. Where were you when you came to?

A. In the hospital.
Q. Were you suffering much pain?
A. Yes, sir.
Q. Do you know how long you stayed in the hospital?
A. Yes, sir.
Q. How long?
A. A little over three months.
Q. Did you suffer while you were in the hospital?
A. Yes, sir.
Q. Do you know how long you have been at the hospital?
A. No, sir.
Q. You don't know?
A. No, sir.
Q. Was any other part of your body besides your arm burned?
A. Yes, sir.
Q. Where, which foot?
A. Both feet.
Q. Any other part of you? Did any other part of your body get burned, except your foot?
A. Under here.
Q. Under your arm?
A. Yes, sir.
Q. Did you ever go down there to that bridge, before?
A. Yes, sir.
Q. How often?
A. I went once.
Q. Once before?
A. Yes, sir.
Q. Did you go up on the bridge as you did this time, when you got hurt?
A. No, sir.
Q. You did not go up on the bridge?
A. No, sir.
Q. You did not climb around there at all?
A. I went half way up the slide.
Q. You went up the slide?
A. Yes, sir.
Q. How high?
A. Half way.
Q. Half way up the slide?
A. Yes, sir.
Q. On either one of these trips, did you see any men working around that bridge or about there?
A. No, sir.
269 Q. You did not see anybody?
A. No, sir.

The Court: I think that is all.

By Mr. Curtis:

Q. Didn't you get your right hand burned?
A. Yes, sir.

Q. Show it to the jury. Show them where it was burned.

(Witness steps down and indicates to the jury.)

Q. Are there any marks on your legs, now, where you were burned?

A. Yes, sir.

Q. Where?

A. Under here. (Indicating right knee, the left shin, the left knee, the back of the left knee, and the bottom of the left foot.)

Q. Are there scars there?

A. Yes, sir.

Q. And after you touched the wire what kind of pain was it that you had in your left arm?

A. Like needles.

Q. Was it very bad?

A. Yes, sir.

Q. Did it hurt you very much?

A. Yes, sir.

Q. I want you to take this pencil and show the Judge on this picture, if you can, just how you climbed up, and then I will show it to the jury afterwards. (Witness does so.)

The Court: Do you remember what wire you hit?

The Witness: No, sir.

Q. As you got up there, did you see some wires?

A. Yes, sir.

Q. You went up on this post you told us about?

A. Yes, sir.

Q. Tell the Judge, when you were up on the post, was it the furthest wire away from you, or was it the nearest one to you?

A. The nearest one.

Q. It was the nearest wire to where you were on the post?

A. Yes, sir.

270 Q. The first set of wires?

A. Yes, sir.

Q. You did not get beyond the wires, or any higher than the wires?

A. No, sir.

(The witness shows the place to the jury by means of a photograph.)

The Witness: I climbed to the top, but I did not see any boards there. Over here was the bird, and I grabbed for it, and I missed it, and I touched the wire.

Q. Afterwards, were you above the wire?

A. No, sir.

Juror No. 7: Where were you when you touched the wire?

The Witness: Here (indicating).

Juror No. 6: Which way did you go up then?

The Witness: This way (indicating).

Q. At that time, David, how old were you?

A. Seven.

Q. And did anybody ever tell you anything about the electric wires at that time?

A. No, sir.

Q. Did you know anything about wires?

A. No, sir.

Q. And when you went up on the bridge, did anybody say anything to you about any wires at all?

A. No, sir.

Q. And the day that you were there before, had you see- other boys on that day climb the bridge?

A. Yes, sir.

Q. And you say it was the wire that was nearest the post that you were on, that you climbed up, that you caught hold of?

A. Yes, sir.

Q. Did you ever hurt that arm before that at all?

A. No, sir.

Q. And of course, outside of that, besides that arm that
271 they had to take off in the hospital, you were never hurt in that part since then?

A. No, sir.

Q. You have not hurt it since?

A. No, sir.

Q. Did you ever have any other accident to your legs or to your feet before this one?

A. No, sir.

Q. How long after the accident did you have any pain in your leg? As best you can remember, the best you can tell us?

A. About three months.

Q. Did you ever have any pain there at all, do you ever have any pain there at all when you run now?

A. Yes.

Q. In your legs?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. Show, in your shirt, how far your arm goes. Take hold of it underneath.

(Witness does as requested.)

Q. Now, David, do you ever feel anything in that part of your arm now?

A. Yes, sir.

Q. How does it feel there?

A. Like needles.

Q. Sometimes?

A. Yes, sir.

Q. It hurts?

A. Yes, sir.

Mr. Curtis: I think that is all, your Honor.

Cross-examination of David Fruchter.

By Mr. Carpenter:

Q. Now, David, if you do not understand any question I ask you, please do not answer it, or try to answer it, but just say you do not understand it. See?

A. Yes, sir.

Q. Now, on the day before the accident, the time before the accident, can you tell us about when that was, when you went across the bridge there, or went up to the bridge and slid down?

The Court: What time of the day?

272 The Witness: The accident happened?

The Court: No, the day before, he is asking you now.

The Witness: I was not there the day before.

The Court: How long before that was it?

The Witness: Sunday.

The Court: Sunday?

The Witness: Yes, sir.

The Court: Can you tell us what day your accident did happen?

The Witness: Friday.

The Court: You said you were there on the Sunday before?

The Witness: Yes, sir.

Q. So you mean you went there for the first time, just a few days before the accident?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. And that Sunday you refer to, that was the first time you had ever been on the bridge?

A. Yes, sir.

Q. Had you ever been up before in that neighborhood, and played in the open lots there near the bridge?

A. No, sir.

Q. What?

A. No, sir.

Q. Do you know where the open lots are there?

A. Yes, sir.

Q. Near the bridge?

A. Yes, sir.

Q. But you had never been in those open lots before?

A. No, sir.

Q. And on this day of the accident—I will withdraw that—on the day before the accident, when you went to the bridge, did you have any conversation with your mother or father before that, just before you went?

A. No, sir.

273 The Court: Did you have any talk with your mother before you went out?

The Witness: No, sir.

Q. They did not tell you on that Sunday, did they tell you to stay around home that day?

A. No, sir.

Q. And had they ever before that told you to stay around home, or stick around, as you used it?

A. Yes, sir.

Q. So on Sunday, when you went away, you knew you were doing what your parents told you not to do?

A. Yes, sir.

Q. Did you? You knew that, did you, David?

A. Yes, sir.

Q. And that day—had your mother or father, David, ever told you to keep away from bridges?

A. No, sir.

Q. And before this Sunday, which was just before the accident, did you know about this bridge being there?

A. No, sir.

Q. Can you tell us about how many blocks you had to go from your house? Just about? Think it over, David. About how many blocks you had to go to reach this bridge?

A. Ten.

Q. About ten blocks?

A. Yes, sir.

Q. Had you ever, before this accident, walked up the Southern Boulevard, to about opposite where this bridge was?

A. No, sir.

Q. Do you know where the Southern Boulevard is?

A. Yes, sir.

Q. You know you can see the bridge from there?

A. Yes, sir.

Q. And had you ever walked with your father and mother about opposite that bridge?

A. No, sir.

274 Q. Before the accident?

A. No, sir.

Q. And the day before, the Sunday, can you tell us who was with you when you went up to the bridge that day?

A. A lot of big fellows.

Q. What big fellows?

A. The big fellows. They went swimming.

Q. Do you mean one of the boys that were on the stand here yesterday or today?

A. No, sir, bigger ones.

Q. Big fellows?

A. Yes, sir.

Q. You were going swimming with them that day?

A. I went with them.

Q. And you did go down over the bridge and go swimming that day?

A. I could not swim, but I went in the water.

Q. When you got there on that Sunday, did you go, did you

leave the roadway and go up into the bridge at all, up into the upper part of the bridge at all?

A. No, sir.

Q. And on that Sunday did the rest of you, you and the rest of the boys, go straight over the bridge, and go down in the water?

A. Yes, sir.

Q. When you came back, did you go right over the bridge again, and walk home?

A. No, sir.

Q. What is that?

A. No, sir.

Q. How did you get home? I am referring to the Sunday?

A. I went on the bridge a little ways, and I slid down again.

Q. What?

A. I went on the bridge a little ways and I slid down again.

Q. On Sunday, you stayed a little on the bridge on Sunday?

A. When we*re* were going home.

Q. Coming home?

A. Yes, sir.

Q. So you did come back the same way?

A. Yes, sir.

275 Q. And the only time you played there was on Sunday?

A. No, sir.

Q. How many times were you playing there?

A. About six.

Q. And did you say you slid on Sunday?

A. Yes, yes, sir, slid down the slides.

Q. How far up did you go from the roadway?

A. You mean up the bridge?

Q. Yes, when you slid on Sunday.

A. About half way.

Q. Now, on Sunday, were there any police officers there or any men?

A. No, sir.

Q. This part of the bridge that you went up on Sunday, was that the part of it, that was nearest to the river?

A. No, sir.

Q. Do you remember?

A. No, sir.

Q. That is to say, as you came back from the river, did you go up that part of the bridge that you came to first?

A. Yes, sir.

Q. That is all I wanted to find out?

A. Yes, sir.

Q. I see. Do you remember, that on that part of the bridge that you played on on Sunday, do you remember that there were no wires there?

A. Yes, sir.

Q. Was that where these boys were playing on Sunday, on that same part of the bridge?

A. No, sir, all over the bridge.

Q. What?
A. No, sir, all over the bridge.
Q. Some were playing with you, and some were playing in other parts?
A. Yes, sir.
Q. Were any of them, do you remember, on Sunday, playing in that part of the bridge where the wires were?
A. Yes, sir.
Q. And that was the first time you had ever seen any boys playing there?
A. Yes, sir.
276 Q. Is that right?
A. Yes, sir.
Q. Now, on Sunday, when you went over to this bridge, did you see any signs that day?
A. Yes, sir, on the side.
Q. You saw signs?
A. Yes, sir.
Q. What did the sign say?
A. I could not read it, it was so small.
Q. What is that?
A. I could not read it. It was so small.
Q. Weren't you going to school at that time, David?
A. Yes, sir.
Q. What grade were you in, do you remember?
A. Yes, sir.
Q. What is that?
A. Yes, sir.
Q. All right. Just tell us?
A. 2-B.
Q. Can you tell us how long you had been going to school? Perhaps that will help us out?
A. One and a half years.
Q. What?
A. One and a half years.
Q. One and a half years?
A. Yes, sir.
Q. Couldn't you read at that time, David?
A. No, sir.
Q. Couldn't you read the word "live," l-i-v-e? Hadn't you ever seen that word before?

Mr. Curtis: Before when?

Q. I am talking about the Sunday before the accident.

The Court: He is talking about that Sunday when you were down there, whether you could read words with one syllable, or words with two?
The Witness: Yes, sir.
The Court: You could read them?
The Witness: Yes, I could.

Q. Tell us, on Sunday, what those signs said?

The Court: Did you see anything in print that day?

277 The Witness: Yes, sir.

The Court: Tell us what it was?

The Witness: "Live wires. Danger."

Q. How many of those signs did you see, David, on Sunday?

A. Four.

Q. Will you tell the Court and jury just where they were, so far as you can recall?

A. There was on- at the beginning, and one at the end on both sides.

Q. That is at each end of the bridge, in the footpath, is that what you mean?

A. Yes, sir.

Q. There was one there?

A. Yes, sir.

Q. Do you remember that well?

A. Yes, sir.

Q. Do you know, do you remember on Sunday, did you see trains running along there at the bridge?

A. Yes, sir.

Q. Did you know they were run by electricity?

A. No, sir.

Q. You did not know that?

A. No, sir.

Q. Now, on the day of the accident, did you see these signs there that day, David?

A. Yes, sir.

Q. They were still there, were they?

A. Yes, sir.

Q. On Sunday before the accident, did you look up at the top of the bridge?

A. No, sir.

Q. You did not?

A. No, sir.

Q. So on Sunday before the accident, you don't know—I will withdraw that—Before you went up the bridge, on the day of the accident, did you look up into the bridge to see if there were any signs?

A. Yes, sir.

Q. Now, why did you do that, David? David, why did you do that? Do you remember why you did that?

A. No, sir.

Q. Did you think there might be some danger on account

278 of those wires, is that why you looked up, David?

A. No, sir.

Q. What?

A. No, sir.

Q. Just why, David, was it, that when you came to the bridge on Sunday, you looked up to see if there were any such signs there?

Mr. Curtis: I object to it.
Mr. Carpenter: I beg your pardon. Did I say Sunday?
Mr. Curtis: Yes.

Q. On the day of the accident, I meant to say, David, what was in your mind, why was it you looked up to see if there were any signs on the upper part of the bridge, before you went up there?

Mr. Curtis: I object to that as already answered.
The Court: It is cross-examination.
Mr. Curtis: I mean the same cross-examiner.
The Court: Is it your theory if the witness answers the question one time, that that prevents another question on the same subject, but in a different form?
Mr. Curtis: Not only the same subject, but the same question.
The Court: The Court sometimes exercises its discretion, and puts an end to the cross-examination when it is merely re-examination, but I do not think it has reached that point here yet. The objection is overruled.

Q. Do you know the question now, David?
A. No, sir.

Q. On the day of the accident, what was in your mind, why
279 was it that you looked up to see if there were any signs on the upper part of the bridge before you went up there?

A. (No answer.)
Q. Now, if you do not understand the question, just say so David, and I will try to make it clear. If you do understand it and can answer, do so?
The Court: You said you saw these signs?
The Witness: Yes, sir.
The Court: Where did you see those signs?
The Witness: On the side.
The Court: Just where the iron was that you slid on?
The Witness: Yes, sir.
The Court: You did not see any on the face of the iron?
The Witness: No, sir.
The Court: He did not look, according to that. He did not have anything in his mind.
Mr. Carpenter: May I call your Honor's attention to the fact that I asked him, when he came to the bridge, if he looked up to see if there were any signs, and he said yes, and now I am asking to find out just why he did that, and what was in his mind.
The Court: Well, go on.
Q. You see, David, I want to find out, if I can, just why it was, when you came to the bridge that day, when you went up there, and this is the day you got hurt, before you went up, why you looked up to see if there were any signs in the upper part of the bridge? Do you remember why?
A. No, sir.
Q. Hadn't anybody ever told you that those wires were alive?
A. No, sir.

280 Q. That was not the reason why you looked up?

A. No, sir.
Q. Who did you say was with you on this day?
A. Joe.
Q. What?
A. Joe.
Q. Is he here in court?
A. Yes, sir.
Q. Was he going swimming, too?
A. Yes, sir.
Q. He was not there to get any iron?
A. No, sir.
Q. He was not gathering iron that day?
A. No, sir.
Q. And he had no bag or anything else with him?
A. No, sir.
Q. And this was the first time that you had ever climbed the bridge?
A. Yes, sir.
Q. Were you barefooted that day, or did you have on shoes?
A. I had shoes on.
Q. Did anybody help you up that incline?
A. I don't know what you mean.
Q. What?
A. I don't know what you mean.
Q. The place where you went up the bridge, at the time you were hurt, did anybody help you up?
A. No, sir.
Q. Nobody got behind you and pushed you?
A. Nobody pushed me but somebody got behind me.
Q. Do you remember who was bheind you?
A. Yes, sir.
Q. Who was that?
A. Joe.
Q. He did not help you to get up at all?
A. No, sir.
Q. Was Joe older than you, or younger, do you remember? Was he a boy of your size, or was he a big boy? That is all I want to know.
A. He was a little bigger.
Q. He did not ask you to go up at all, did he?
A. No, sir.
281 Q. You went up this without any——

Mr. Curtis: That is objected to, as thoroughly answered to this examiner. This is the third time.
Mr. Carpenter: This is not the third time. I never have touched on the subject before.
The Court: Very well. Ask him the question.

Q. Did anybody ask you to go up the bridge at all, either Joe or anybody?
A. No, sir.
Q. Wasn't that a pretty steep incline there that you had to go up?
A. Yes, sir.

Q. It was a good hard climb, was it, David?
A. No, sir.
Q. You did not have to work hard to get up there?
A. No, sir.
Q. Didn't your feet slip, and did you have hard work getting up?
A. No, sir.
Q. You had never been climbing trees or anything like that before, had you?

Mr. Curtis: That is objected to as incompetent, irrelevant and immaterial.
The Court: Objection sustained.
Mr. Carpenter: All right.

Q. Well, you had never climbed any structure like this before, had you?

Mr. Curtis: Objected to as incompetent, irrelevant and immaterial.
The Court: I do not know. It might show what his experience had been. Whether it was a very arduous or difficult undertaking for a boy of that age, or whether it was easy.
Mr. Carpenter: That is all I am doing it for, your Honor.
282 Mr. Curtis: I do not see what difference it would make.
The Court: That it would bring to the attention of the defendant, the fact as to whether they were maintaining practically a nuisance there. They could not have contemplated it as a place where only a squirrel would go, but if it was easy and accessible, it would be different.
Mr. Curtis: We produced some pretty good healthy squirrels all day yesterday, your Honor.
The Court: Go into it, if you want to.

Q. Had you ever been climbing up any structures before, any trees, or anything of that kind?

Mr. Curtis: I object to that.
The Court: Objection sustained. I do not think it very material.

Q. Now, David, are you sure it was not hard to go up there?
A. Yes, sir.
Q. When you got up to the top of the bridge, what did you do?
A. I saw a bird, a pigeon.
Q. First, did you stand up there, or what did you do there?
A. I stood.
Q. You stood up?
A. Yes.
Q. Where did you go from there after you stood up?
A. I climbed up the pole.
Q. Didn't you have to walk some distance before you reached any pole to climb up?
A. No, sir.
Q. And on this day that you climbed up, were there any men on that bridge working?

A. No, sir.
Q. Was there any police officer there?
A. No, sir.
283 Q. If there had been, you would not have gone up, would you, David? Would you?

Mr. Curtis: That is objected to as incompetent, irrelevant and immaterial.
The Court: That is a hypothetical question.
Mr. Carpenter: If your Honor please, I call your Honor's attention to the fact that now we are on a vital point here in this case, to determine the attitude of mind of this plaintiff, toward this structure, and I do submit that this is a question which is very material, as to his views towards those men, and those in authority, and as to how he would regard them at least, if they were there or near him. I submit it is very material.
Mr. Curtis: I submit it is hypothetical and immaterial, and that they cannot hide behind the skirts of the municipality; that the officer is not in their employ, and was no guard, so far as they are concerned.
Mr. Carpenter: I am not talking about the municipality. I am inquiring about the state of mind of the boy.

Q. If there had been, you would not have gone up, would you David?
A. No, sir.
Q. And was that the reason why you looked around to see whether there was anybody there before you went up? That was the reason, wasn't it, David?
A. Yes, sir.

Mr. Curtis: That is objected to as incompetent, immaterial and irrelevant.
The Court: He has answered it.

Q. Did you say yes?
A. Yes, sir.

284 The Court: But there was not any policeman there.

Q. That was the reason also why you looked around to see whether there were any workmen there or anybody on the bridge?

Mr. Curtis: That is objected to as incompetent, irrelevant and immaterial.
The Court: Did he say that? I don't know whether he has or not. (To the witness:) Did you see any men working around there at that time?
The Witness: No, sir.
The Court: Did you or not look around to see if there were any workmen about?
The Witness: I did look.
The Court: You say you did?

The Witness: Yes, sir.
The Court: He asked you why did you look? What were you looking for them for? Why did you want to see if there were any men around there for? Can you tell us?
The Witness: No, sir.
The Court: If you can give us an idea, tell us why you were looking for other people?
The Witness: I don't know.

Q. Was it in your mind, David, that you wanted to make sure that there were no men around there before you went up?

Mr. Curtis: To that we object as improper in form, and as calling for a conclusion. It amounts to a hypothetical question.
The Court: Do you understand that?
The Witness: No, sir.
The Court: You say you looked to see if there were any men there under or about the bridge?
The Witness: Yes, sir.

285 Q. And why did you want to know whether they were there? Why did you want to look for men? Did you think somebody might keep you from climbing up?
The Witness: Yes, sir.
The Court: That was the idea?
The Witness: Yes, sir.
The Court: That answers the question.

Q. When you got to the place where there was a pole, a steel pole on top of the bridge, was there any lattice—was that steel pole straight up in the air?
A. Yes, sir.
Q. Did it stand straight up in the air?
A. Yes, sir.
The Court: Do you know what he is talking about, when he said a steel pole?
The Witness: Yes, sir, that iron.
The Court: Is this the one you think he is talking about (handing photograph to the witness)?
The Witness: Yes, sir.
The Court: The one that goes up that way?
The Witness: Yes, sir.
The Court: All right.
Mr. Carpenter: May I just see that picture, your Honor?
The Court: He points out the one that you are describing.
Mr. Carpenter: Yes, sir.

Q. You remember very well then, David, that it was the pole on the right hand side of the bridge as you approached it?
A. Yes, sir.
Q. And it was the pole at the end of the bridge that you came to first?
A. Yes, sir.

Q. It was at the end of the bridge that you came to first and your way there? That is, you did not have to cross the bridge to
286 get this pole?

A. No, sir.

Q. Do you understand that?

A. Yes, sir.

Q. Were you the first boy up? I am talking about the accident, do you remember?

Mr. Curtis: He has already answered that.

The Court: It will save time to answer the question.

Q. You were the first one up there, were you, David?

The Court: The*y* day you got hurt, were you the first one that went up, or was there another boy ahead of you?

The Witness: I was the first one up.

The Court: There was a boy right behind you?

The Witness: Yes, sir.

Q. When you reached th*h*is pole where the wires were, wern't you the first one there?

A. Yes, sir.

Q. You had never seen anybody go up that strut, had you?

A. No, sir.

Q. How far did you have to climb before you reached that strut?

A. Three feet.

Q. Can you point out, David, what to your mind would be about what you had to climb? It was more than three feet, wasn't, David?

Mr. Curtis: Which is the question?

Mr. Carpenter: I am trying to be as simple and fair with this boy as I can.

Q. Can you point out, David? Can you point out what to your mind would be about what you had to climb? It was more than three feet, wasn't it?

The Court: I want you to look at that desk and at that
287 table, and say if it was higher than that?

The Witness: It was higher than that.

The Court: It was higher than that?

The Witness: Yes, sir.

The *Witness:* Look at the ground down there, and look at the edge of the table. Was it about that height, or not quite so high?

The Witness: Not quite so high as this.

Mr. Curtis: He says the pole was higher than that. I think he misunderstood you, as to how high he meant.

The Court: Are you asking for the height of the wire?

Mr. Carpenter: No, the distance he climbed

The Court: Tell them about how high you climbed to get at the wires.

Mr. Carpenter: Perhaps I can put it this way, your Honor, if you will allow me to interject.

The Court: Yes.

Q. Did you climb up higher than you- own height?
A. No, sir.
Q. What?
A. No, sir.

The Court: Go down there, son, at the side of the wall, and put your hand there, about as high as you had to climb up?

(Witness indicates on the wall as a height of about 27 inches.)

Q. Well, do you remember the wire that was nearest the strut, or further away—I will withdraw strut—do you remember the wire which was nearest to the pole, or further out from the pole, wasn't it, than the distance you have indicated there? Than the distance you have pointed out there?

288 Mr. Curtis: I object to it as argument.

The Court: Yes. I do not think that that question is calculated to get it.

Mr. Carpenter: I am trying to find out how he could have got hold of that wire from that distance?

The Court: Tell us how you got hold of the wire?

The Witness: I climbed up there.

The Court: But this wire was out of your reach How did you get hold of that wire? How did you reach over there? You were grabbing at a bird, I understand.

The Witness: Yes, sir.

The Court: And were you on the pole at the time you reached that highest piece, or whatever it is, that runs up to where the bird was, from where you were standing?

The Witness: I was on the pole.

The Court: And the bird was near enough for you to reach over to it?

The Witness: Yes, sir.

The Court: Well, I don't know what more you want.

Q. When you were in that position, where you were reaching out for the bird, will you tell us how you were holding on with your other hand, if you remember, David? What did you have hold of, do you remember it?
A. The inside like, the ladder.
Q. The inside of the ladder?
A. Yes.
Q. I suppose you had, with your right hand, a hold of that, was that it?
A. Yes, sir.
Q. Do you remember on which wire that bird was, David?
A. The bottom wire.

289 Q. Now, just look at this picture, David, and tell us if you can, whether you went up the face of that pole. Did

you go up the face of the pole here, or did you go around to the side and go up?

A. I went up here.

Q. You went up the front face?

A. Yes.

Q. You did not at any time pass beyond the pole and go up?

A. No, sir.

Q. Did you get high enough up, so that your head was even with the big iron cross bar that held these wires?

A. Yes, sir.

Q. Your head was up even with that?

A. Yes, sir.

Q. That is right, is it?

A. Yes, sir.

Q. And was your hand on the lattice work, or was it on this iron cross bar, the other hand that you held on with?

A. In the lattice.

Q. In the lattice?

A. Yes, sir.

Q. Is that right?

A. Yes, sir. (Indicating the lattice.)

Q. And then, as you stood there, you reached out?

A. Yes, sir.

Q. Was that bird, if you remember, David, on the wire, this side of the pole, or on the wire outside of the pole?

A. This side.

Q. Just show which you mean?

A. Here (indicting).

Q. On the outside of the bridge?

A. Yes, sir.

Q. And about how far, if you can tell us, David, was that bird from this strut. From this pole? Can you tell, in feet or inches?

A. No, sir.

Q. Can you show us some space which will give us an idea?

A. About my hand's reach.

Q. About your hand's reach?

A. Yes, sir.

Q. So the bird then was out there, just about the length of your hand's reach?

A. Yes, sir.

290 Mr. Carpenter: Could I ask to have this marked for identification, your Honor, inasmuch as the witness has referred to it?

The Court: Yes.

Photograph marked as Defendant's Exhibit A for identification.

Q. Could you just barely reach out to where that was?

A. Yes, sir.

Q. David, just stand up there a minute, will you, please? Just stand up this way, and put your arm out straight.

Mr. Carpenter: (After measuring length of witness' arm.) About 10½ inches.

Q. Well, now, when you got burned, did you fall down from the bridge?
A. I don't know.
Q. What was the next thing you recollect? Where were you? What was the next thing you know?
A. I was in the hospital.
Q. And when you were in the hospital, did you make any statement to anybody from the railroad company about how this accident occurred?
A. No, sir.

Mr. Curtis: I object to the question in that form, but I will withdraw the objection.

Q. When I say a statement, David, I mean did you talk with anybody there about how the accident happened, or how you got hurt?
A. No, sir.
Q. Are you quite sure, David, that in the last part of June, right after the accident, you did not talk with anybody?
A. No, sir.

Mr. Carpenter: Is Mr. Hildridge here?

(A man stands up in the court room.)

Q. Do you remember seeing Mr. Hildridge at all?
A. No, sir.
291 Q. Do you remember Dr. Flynn who attended you in the hospital?

The Court: Do you know that doctor by name?
The Witness: Yes, sir.
The Court: Do you know a doctor named Flynn?
The Witness: I think I do.
The Court: You are not certain?
The Witness: No, sir.
The Court: He says he may, but he is not certain

Q. I see. Don't you ever remember Dr. Flynn, who was the same doctor who was there by you, and this gentleman was there, that I have had just stand up, and that you talked with them about this accident? Don't you remember it?
A. No, sir.
Q. You do not recall it at all?
A. No, sir.
Q. Then let me see if I can refresh your recollection. Is Mr. Mulcox here?

Mr. Mulcox: Yes, sir.

Q. Come a little closer, Mr. Mulcox, will you? Just sit here, where you can see. That is all right, Mr. Mulcox. Do you remem-

ber seeing him there in the hospital, when he was taking some notes, down of what you said?

Mr. Curtis: I object to that as to form.

The Court: Objection sustained.

Mr. Carpenter: Exception.

The Court: Will you undertake to offer in this case anything that this child said under such an examination as that, and would you undertake to offer something which is written, made by them, when the law does not recognize that what they did they are bound by?

292 Mr. Carpenter: Simply to show the boy's recollection at a time when it was fresher than it is now.

The Court: Didn't the surgeon testify yesterday that he was under the influence of opiates for two months?

Mr. Carpenter: I submit, if your Honor please, that at the time the statement was taken, if his recollection was good, when he was describing what he knew about the accident, that this is very material.

The Court: It is for the jury to determine as to what the boy said under such circumstances, rather than the statement of men who wrote what he did say.

Mr. Carpenter: I must except to your Honor's remark. It seems to me, if your Honor would stop to consider——

The Court: I won't say, really, what I think about such an examination, but go on with your examination.

Mr. Carpenter: May I have an exception to your Honor's remark?

The Court: Yes, take it. I understand that it is the law, throughout the United States, and as old as the common law itself, that an infant is not bound by his contracts, or even by what he signs and seals. He has the right, within a reasonable time after he is 21 years of age, to refute the most solemn contract, and then, to undertake to bind the plaintiff, seven years old, in a statement he made about this thing.

Mr. Curtis: Your Honor will recall the questions at the time the doctor said he was under opiates for his pain.

293 The Court: You may ask what he said, and all that.

Mr. Carpenter: If your Honor please, I do not wish your Honor to misunderstand my position. I assumed that it was foundamental that I could, in showing the credibility of a witness, whether he was a boy or a man, that I could examine him on a statement that he made soon after the occurrence.

The Court: I simply suggested that if you are proposing to lay a predicate for the introduction of a statement made to some agent, or to some doctor, under the circumstances under which this boy may have made it in the hospital, it would not be admitted, and I say it here again.

Mr. Carpenter: I must respectfully except.

The Court: Go on and examine your witness and see whether he is credible.

Mr. Carpenter: I must respectfully except, it seems to me, your

Honor, that the remark in this very serious case has been so prejudicial to the defendant, that I am really entitled to a withdrawal.

The Court: It is not intended, gentlemen of the jury, to prejudice you against the company, the defendant in this case at all, but I am simply suggesting to counsel what I think would be a proper ruling when such a document is presented, under the circumstances as disclosed by the testimony, so far as adduced in this trial.

Mr. Curtis: Under the United States practice, as we all
294 know, a judge can say what he thinks about the evidence.

The Court: It does not control the minds of the jury. A judge can comment upon the testimony in his charge, but the jury will be left free and untrammeled in their opinion as to what they are to believe.

Mr. Carpenter: I submit, if your Honor please, in view of what you have already stated, that it seems to me reflecting on my own conduct, that it has been prejudicial to my client in this case, and I certainly never had any intention of doing anything which would be prejudicial. I have been attempting to try this case fairly, and for the best interests of the defendant in this case.

The Court: I have said nothing, except to indicate what the ruling of the Court would be upon an attempt to introduce a document contradicting the witness, and this seems to be a predicate for it.

Mr. Carpenter: But your Honor went outside of that, and prejudiced the weight of that evidence if it comes in later. I don't know what your Honor will rule, and I contend your Honor absolutely destroyed it, by the statement of the position your Honor has taken.

The Court: Not at all. When you get to that point, it is a matter for the admission of such a document, and the Court will determine it.

Mr. Carpenter: May I have an exception to your Honor's ruling that I am not entitled to a withdrawal at this time?

The Court: Yes.

295 Q. Let me ask you this. Didn't you say, in June of 1916, when you were in the hospital there, didn't you say when these three men were there, that you saw the sign "Live Wires" on top of the bridge?

A. No, sir.

Q. Do you remember that you did not say that?

Mr. Curtis: I object to that. He has answered, if your Honor please.

The Court: Well, he just simply is asking it over again, the same question, practically.

Q. And isn't it true then, do you remember that, if you remember that you did not say that, do you remember that you have now in mind the fact that you were having a conversation a talk with somebody in the hospital there?

Mr. Curtis: I object to the question as going into a lengthy dissertation with a child.

The Court: Yes, and with a preamble that absolutely no witness in the case is intelligent enough to apprehend.

Mr. Carpenter: Well, I think it is a very intelligent question, if the Court please.

The Court: If you think so I may entertain a very different opinion, but go on with your question.

Q. Didn't you say there, when you were in the hospital, David, didn't you make some statement of any kind in regard to—do not answer now—in regard to the signs in the top part of the bridge?

Mr. Curtis: That I object to, upon the ground that under the law of this State, they must ask the direct question, with the same
296 words, as far as possible, if they expect to lay a foundation with which to contradict the witness.

The Court: Do you understand what the gentleman is asking you? Do you remember having any talk with two strangers that he has shown you here this morning?

The Witness: No, sir.

The Court: While you were in the hospital?

The Witness: No, sir.

The Court: You do not remember anything you said to them at all?

The Witness: No, sir.

The Court: About the bridge or about the accident?

The Witness: No, sir.

Q. Didn't you tell them that day that you were going up to slide on the bridge at the time you were hurt?

Mr. Curtis: We object to it, upon the ground that he stated he had no conversation at any time. He said he remembers no talk whatever.

The Court: That goes to his recollection. He may ask him that.

Q. Did you tell them that day that you were going up to slide on the bridge at the time you were hurt?

A. No, sir.

Q. Do you remember telling them that day that this sign that was on the top of the bridge was about 15 feet away from where you were hurt?

A. No, sir.

Q. Do you remember any talk about that at all?

Mr. Curtis: That is objected to, if your Honor please.

297 The Court: That is the same question again. In answer to the question the Court propounded to him, he said he did not remember the men, or did not remember any talk with them at all.

Mr. Carpenter: Does your Honor say I cannot ask the last question?

The Court: You can go on and ask it over again, as many times as you want to do it.

Mr. Carpenter: I simply want the witness to answer this specific point I am asking about, as to whether he recalls anything about it.

The Court: He answered it in the negative.

Q. Didn't you tell them that day, David, that the reason you went up there, near that wire, was because you thought that wire was dead?

A. No, sir.

Q. And you remember having no conversation about live or dead wires?

A. No, sir.

Q. And didn't you tell them that the reason why you went up there was not because you were after birds' nests, but because there was no sign right at that post? Didn't you tell them that?

A. No, sir.

Q. And didn't you say to them first that you did not know you had no right up there, and then didn't you say that you did know that you had no right up on that bridge?

A. No, sir.

Q. Didn't you say to them there that day that you knew there was no man on the bridge, because you looked before you went up?

A. No, sir.

Mr. Carpenter: I think that is all, your Honor.

298 Redirect examination.

By Mr. Curtis:

Q. Just one or two questions, please, David. Now, you made two answers to Mr. Carpenter, the gentleman who sat down, and in the first part of your examination, you told him you did not know how to read at that time, and afterwards you said you did know, and I do not care which it is.

The Court: You need not go on to explain to him now. That is a little more than leading. Of course, you are entitled to lead a witness of his age, but do not go on.

Q. I am talking about the day of the accident, not since then, but the day of the accident, when you were seven years old, not since. At that time, when you were seven years old, the day of the accident, at that time, could you read then?

A. No, sir.

Q. Since then, you have got so you can read, is that right?

A. Yes, sir.

Q. At the time of the accident, not since then, but at the time of the accident could you read the words "Live Wires"?

A. No, sir.

Q. You have heard what that was since, is that right? People have told you what that was since? Do you hear me? You say you could not read those words when you were seven years old, is that right?

A. Yes, sir.
Q. And you can read them now?
A. Yes, sir.
Q. But you could not then, is that it?
A. Yes, sir.
The Court: Can you read now?
The Witness: Yes, sir.
The Court: What is on that paper there (handing paper to the witness)?
299 The Witness: Western Union Telegram, New York.

Mr. Curtis: That is all.

Recross-examination.

By Mr. Carpenter:

Q. David, do you remember at the time when you were in the hospital, this question and this answer?

The Court: That cross-examination was concluded.
Mr. Carpenter: What is that, your Honor?
The Court: I say that you concluded your cross-examination on that line, and it would be to add something that he has not brought out on the strict rebuttal. You are going back on the same line of cross-examination.
Mr. Carpenter: Not at all. The little boy has contradicted himself, as to whether or not he could read and whether or not at that time, he knew whether the wire was live or dead.
The Court: Well, ask the question.

Q. Do you remember this taking place, David? "Q. What do you mean by a dead wire? A. It ain't a live wire. Q. What is a live wire? A. It burns you." Q. Do you remember that taking place?

Mr. Curtis: We object.

The Witness: No, sir.

The Court: That has nothing about reading. I exclude that question and answer on the ground that the defendant exhausted his cross-examination when he had the witness after the direct-examination.
300 Mr. Carpenter: If your Honor please, I offer this for the purpose of showing that this boy knew from the signs on the bridge at the time of the accident, that there were signs posted there.
The Court: That question does not include anything about a sign on the bridge.
Mr. Carpenter: I know, but in my former questions to him, I showed that signs were discussed there.
The Court: There is nothing about his reading any signs.
Mr. Carpenter: Why, your Honor, I asked the question.

The Court: And I excluded the question. Take your exception.
Mr. Carpenter: I except.

Q. Now then, one question. Do you remember when was your birthday?
A. July the 5th.
Q. July the 5th?
A. Yes, sir.
Q. And how old will you be, or were you, on July 5th?
A. Eight.
Q. Oh, no. I mean this year?
A. Twelve.
Q. Twelve?
A. Yes, sir.

Mr. Carpenter: That is all.
Mr. Curtis: That is all.

Plaintiff rests.

Mr. Curtis: We ought to have it on the record that the two cases are tried as one, and that the evidence in the one should be applicable to the other, so far as possible.
The Court: Yes.
Mr. Curtis: That being so, your Honor, the plaintiff rests.
301 The Court: What damages have you shown by any testimony by the father?
Mr. Curtis: In the first place, outside of the theory that the jury may give a reasonable sum, we have shown the doctor's bills for his visit every other day for four months. The father is responsible in this case. The father had to pay it.
The Court: I had not heard any evidence on that line. I have heard no testimony as to any loss to which the father himself was subjected.
Mr. Curtis: Didn't your Honor hear him swear to that evidence, that he paid the doctor two dollars a visit for four months?
The Court: You cannot ask the witness anything, or even the plaintiff himself, as to that. All he can do is to swing his injured arm or leg around, but he cannot say anything as to the expenses of his injuries or anything about them.
Mr. Curtis: I say that we have proved, so far as a prima facie case is concerned, that that doctor was paid two dollars a day for four months. I am talking about the special damage on the two dollars a day, for the father, every other day, for four months.
Mr. Carpenter: That is my recollection, Mr. Curtis.
The Court: Very well, if you will agree with him then.
Mr. Carpenter: Substantially that.
Mr. Curtis: We rest.
302 Mr. Carpenter: If your Honor please, we move to dismiss the complaint here on the ground that the complaint is brought on the theory of attractive nuisance, and the accident occurred in the State of New York, where the Court of Appeals has

finally and definitely held that such action does not lie here in this State, taking issue with the Federal Courts, where that doctrine was early announced, and I refer——

The Court: I am not familiar with your State decisions.

Mr. Carpenter: I refer to the case against the Fitchburg Railroad, in 145 New York where they laid that down definitely. There was there a turntable, maintained by the Fitchburg Railroad, in a vacant lot, owned by the railroad company, bounded by streets on four sides, through which a path ran, which was used by the public commonly, and known to be so, or presumptively so, by the railroad. The railroad made no protest against the use of that path. Within about 15 feet of that path, on the ground, but slightly raised, was this turntable. As it was left on the day of the accident, it was not fixed so that it could not be moved. The boy in question, who was then about 8 years old, as I recall it——

The Court: Before you go into that, you admit that this would be a question of general jurisprudence, wouldn't it?

Mr. Carpenter: No, I do not.

The Court: And if the Supreme Court of the United States has not followed the rule of the Federal Court, then any decision
303 of the Court of Appeals of the State of New York would be inapplicable.

Mr. Curtis: Furthermore, the cases are definite, in the Supreme Court, right there on that.

The Court: The Supreme Court has laid down the rule in the turntable cases to start with, which is the principle which governs in such cases. Well, now, this being a Court of general jurisdiction, and federal jurisdiction, whether this Court would be controlled by the authority of the Supreme Court of the United States, or by the highest Court of the state—if it was on the construction of a statute of New York, of course it would be binding on this Court, regardless of the Supreme Court of the United States, but not being on any particular statute, but a question of general jurisprudence, then this Court is controlled by the highest Court in this jurisdiction, and that would be the Supreme Court in Washington.

Mr. Carpenter: I appreciate the general principle to which your Honor has referred, but as your Honor just stated, the federal Courts, the trial Courts, especially the Circuit Courts, and the District Courts, have always treated with great respect the decision of the State Courts of last resort, and I assume, of course, that your Honor, sitting as a Federal Judge, would be greatly influenced by the decision of the Court of last resort, which, as I believe I
304 can convince your Honor, where it has been steadfastly adhered to, as the doctrine of this state, and furthermore this case started, was brought in the state court, and then removed, and that is another point, and at the time of the accident, the accident occurring within the bounds of the State of New York, it seems to me that the principal laid down in that case, and in those which followed that case, should weigh very importantly with your Honor, in determining whether or not this plaintiff has made out a case against this defendant.

Now, furthermore, it has been held, in the Heller case, which was a case going to the Circuit Court of Appeals, and where this New Haven Railroad was sued because they failed to guard these high tension wires near a bridge, and where they were far more accessible than they are here, because of altitude, and all he had to do was to step down, from the side of the bridge on the stone abutment, that came up practically level with it, down about three feet, into a space which was composed of the concrete structure supporting the bridge.

Above the bridge there was a screening put up by the railroad company, for the purpose of keeping the boys and the public from getting down to the live wires below, but this screening ran separate from the rail of the bridge, separate, down the side of the abutment, thereby leaving a space at the bottom of the screening, so that a boy or anybody else getting down in this concrete space, could reach out, by reaching about two feet, and touch the wire.

305 The boy, did that in this case, and there the Court let the case go to the jury, but the Circuit Court of Appeals held that the plaintiff had failed to make out any negligence whatsoever on the part of the railroad company, and said it was not necessary to go into the question of the turntable doctrine. That even admitting that the turntable doctrine applied, that the plaintiff had utterly failed to show any negligence whatsoever.

Now in this case, if the Court pleases, I move to dismiss further on the ground that the plaintiff has not shown, assuming that the turntable doctrine applies, the plaintiff has not shown that this defendant maintained any alluring, enticing and attractive nuisance. This instrument which injured this unfortunate boy was not a mechanical device. There is nothing simpler than a wire. There was no machinery about it. There was nothing inherent, in a mechanical way, used, to encourage a boy to go up into the heights of a steel structure, off a highway, so as to make the defendant chargeable with notice of such a prevailing and well known tendency on the part of human nature, and thereby force it to adopt a practice which would prevent it, and I content further, if the Court please, that the plaintiff has not shown that the defendant was guilty of any negligence which was the sole and proximate cause of this accident.

306 The plaintiff has alleged various things here in this complaint, various charges of negligence, and one was that this defendant maintained a bridge with trellis work, which was in such shape, that it was practically a stairway, and thereby an invitation.

Now the plaintiff, your Honor, has utterly failed to show——

The Court: Have you spread on the record there all the grounds of your motion, so that I can rule at this time? Of course, in the Federal Court, it is discretionary whether the Judge will send the case to the jury, and you may have an exception, but you have the right to renew that motion at the end of the case, and then I will hear your argument, and I would like to see, principally, the Circuit

Court of Appeals case, but you have got all your grounds there, and I will overrule it.

Mr. Curtis: I will be able to show your Honor a very late authority, in which the one in question is discredited.

The Court: Before the Railroad Company can be held responsible, two things must exist, first that it was such an obstruction, that from its experience it was calculated, to a reasonable mind, to attract incautious children, and that such a thing could have been contemplated.

Now, if it was not such a thing as would reasonably appear to the ordinary mind, as being attractive nuisance or something that would lure children to danger, then if, it was not within the
307 contemplation of such an instrument as anybody could see that it would have that effect, then there must have been notice somewhere and there should be notice brought to an official or employee of the company, and such notice as would be binding upon it.

Mr. Curtis: We do not have to bring it to any official.

The Court: I am not asking for argument now.

Mr. Curtis: I want to just briefly meet your Honor's impressions. Right here in this very State, we have actions pending for holes in the city streets, and we do not even have to produce a police officer to show it. We simply say it was there for ten days or a week. I mean on the question of notice.

The Court: In this case if it necessarily allured, then there must be notice of some kind.

Mr. Curtis: As to the question whether they considered it a lure, they had notice for three years, or should have notice, that it did lure.

The Court: I won't go into it now. I just make that suggestion. You must be prepared to meet those things.

Mr. Carpenter: I have not yet stated all my grounds. I think I should state them.

The Court: Yes, state them on the record.

Mr. Carpenter: I move also to dismiss on the ground that the plaintiff has utterly failed to show that this defendant had legal or sufficient notice, implied or constructive, that the situation
308 which the defendant is alleged to have maintained, was alluring, enticing and attractive to children, with the result that the accident occurred and that the defendant was solely at fault.

I also move to dismiss on the ground that the plaintiff has failed to show utterly what the local situation was, and the relationship of the defendant to the bridge, up which the plaintiff boy went at the time he was hurt, it being, however, already shown in this case that the public used that bridge, and therefore, presumptively, there was a dedication of that bridge, and therefore presumptively, that it was public property, and not that of the railroad company, and it has not been shown what the responsibility of the defendant was in respect to the maintaining of that bridge so as to make it in any way chargeable with fault or negligence in failing to guard the

trellis work or the lattice work, or in failing to maintain a guard there, either material or human as alleged in the complaint.

It is not shown that the local situation was such that the defendant was bound to maintain those, and if it did not, it was guilty of fault, because there is no proof.

The Court: Do you now state the grounds or argument?

Mr. Carpenter: I guess I have sufficiently made that clear.

The Court: Just state your grounds and then leave your argument for the time of your renewal of your motion.

309 Mr. Carpenter: Yes, sir. I also move to dismiss upon the ground that the plaintiff has utterly failed to show also that the defendant was under any obligation to maintain warning signs on the bridge, and that its policy in any such respect was the sole and proximate cause of the accident.

I move further to dismiss on the ground that the plaintiff has failed to produce any proof whatsoever on its charge that this defendant was guilty of negligence because it did not insulate the wire or protect it by rubber covering, or by other covering.

I move further to dismiss on the ground that there is no proof in this case that in maintaining this wire as it did under these circumstances, the defendant violated the prevailing reasonable practice on the part of companies maintaining wires under similar circumstances.

In other words, on the ground that there is no proof that the defendant was guilty of any neglect in the practice which it pursued, and on the ground that there is no proof that this practice was not standard.

I think that covers it, your Honor.

The Court: Motion denied.

Mr. Carpenter: May I have an exception, your Honor?

The Court: Yes.

Mr. Carpenter: One other thing, your Honor. As I recall the complaint, it also alleged that the defendant was guilty of negligence in not maintaining signs near the wire in question, and in

310 not maintaining guards up there also as well as down on the bridge, guards material and human, so as to prevent children coming in contact with that wire.

I further move to dismiss on the ground that there is no proof that the defendant was under any such obligation with respect to protecting a wire which was, as has been shown in this case, some thirty feet above the highway.

I move further to dismiss on the ground that the plaintiff has failed to show but that that boy was a trespasser on there, and at the most a bare licensee, and in respect to which it makes no difference, so far as the defendant's obligation is concerned, which he was, for I contend that under the law, all the defendant owed that boy in that situation, coming up there, as he did, off that highway, was to avoid affirmatively and actively and wantonly injuring him, and there is no proof of affirmative neglect of any kind, or of such wanton and wilful and affirmative neglect in this case.

I think that that now covers it.

HERBERT C. KEITH, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

Direct examination.

By Mr. Carpenter:

Q. What is your name?
A. Herbert C. Keith.

Mr. Carpenter: If your Honor please, I must ask your in-
311 dulgence for a moment. I find in looking over the complaint that there is also a charge of neglect in building this bridge. I wish to have the record show that on the question of the defective construction of the bridge, that I move to dismiss on the ground that the plaintiff has not shown any cause of action, on that ground.

The Court: Yes. Motion denied.
Mr. Carpenter: Exception.

Q. Mr. Keith, your business is?
A. I am a consulting civil engineer.
Q. By whom are you employed at the present time?
A. I am consulting engineer in private practice.
Q. And are you familiar with this bridge at 149th Street near the Southern Boulevard?
A. I am. I think that is the bridge that was called the Bungay Street bridge, is it not?
Q. That is right?
A. I am familiar with that bridge.
Q. Were you connected with the City of New York as the consulting engineer?
A. No, I was consulting engineer for the New York, New Haven & Hartford Railroad Company at the time of the building of this bridge, and I designed it.
Q. Were you ever employed by the City of New York in any way as an engineer?
A. Not lately, except in some small cases.
Q. How long have you practiced as a construction and consulting engineer?
A. As a consulting engineer, seventeen years.
Q. And in the course of those seventeen years what type of work have you been engaged in?
A. I have specialized in structural work, and in railroad work, chiefly.
312 Q. Dealing with steel structural work?
A. Yes.
Q. You were then employed for the defendant at the time of the construction of this bridge?
A. Yes, sir.
Q. Can you tell us the date when that bridge was constructed, about?

A. The construction was about 1908. The plans were made in 1906, and it was some little time after that that the actual construction was made.

Q. And do you know when the bridge was completed and opened to the public use?

A. I think about 1908.

Q. Now, at the time that the bridge was planned and designed and built, was there any superstructure on it, carrying wires, planned and devised at that time?

A. No.

Q. Have you refreshed your recollection by looking over the plans?

A. I have.

Q. What was that bridge designed and built for?

A. For carrying Bungay Street or 149th Street, over the tracks of the Harlem River Branch of the New York, New Haven & Hartford Railroad Company.

Q. That is known as the Harlem River & Port Chester Railroad?

A. No, the Harlem River Branch of the New York, New Haven & Hartford Railroad Company.

Q. Is it customary, or was it customary at that time, in constructing bridges of that type, to carry the highway over a depressed railroad right of way, to use steel lattice work?

A. It was and is now.

Q. And will you tell us your opinion as an engineer, why that was designed that way rather than in solid pieces?

313 Mr. Curtis: That we object to, if the Court please, as incompetent and immaterial.

The Court: Well, he says that is common usage in building these bridges to do it with these trellises. Do you admit that that is the ordinary and usual method to pursue?

Mr. Curtis: I do not know anything about it. It is for us to question why. Not them. They say it is.

The Court: I think that is as far as you can go, that that is the usual and customary method. I suppose it is for the use of employees, getting on top of it and repairing it.

Mr. Curtis: I have not attacked it.

The Court: Is there any necessity of going any further? He admits that the Railroad Company usually had this practice.

Mr. Curtis: No, I do not admit anything.

The Court: Then go on with the question. I do not propose to use an hour here about nothing.

Mr. Curtis: We except.

Q. The Court rules you may answer.

The Court: I do not see what sort of materiality it would really have, whether it was built according to standard has nothing to do with it at all. What does that have to do with it?

Mr. Carpenter: It has everything to do with it, your Honor, to show that it was not made as a way of approach into the top, and into the superstructure. It was not designed as a part of it.

314 The Court: That is far enough, then, to show that that was the usual and ordinary practice of constructing bridges in such places over streets, &c., that they were built that way, and that this trellis was used by the Standard bridge makers, &c.

Q. I will put the question this way. What was the function of this trellis work in building that bridge?

Mr. Curtis: That we object to.
The Court: Objection overruled.
Mr. Curtis: Exception.

A. To stiffen the component parts of the vertical posts, where latticing was used.
Q. So as to support the stresses and strains, and to carry the weight and burdens?
A. Yes, sir.
Q. Was that the only object and design in regard to building the bridge in that way?

Mr. Curtis: We object to what the object was, if your Honor please.
Mr. Carpenter: I will withdraw it.

Q. Was that the only intention that it was designed to cover?

Mr. Curtis: That is the same question.
The Court: Objection overruled.
Mr. Curtis: Exception.

The Witness: It was.

The Court: It may be admitted, yes, that it was not used, and not put there for general purposes, not for public use.
Mr. Carpenter: I should think it ought to be, but in view of their complaint it does not seem so.

Q. Can you tell by referring to the records—can you give
315 us the dimensions of the bridge proper?

The Court: He said that the intention was to strengthen it. There is no denial that they were there.
Mr. Carpenter: If your Honor please, I would merely like to have it on the record how high the bridge was, so that the jury may know accordingly.
The Court: Very well. All I want to get is that I do not think it is necessary to go into a whole lot of immaterial matters in this case.
Mr. Carpenter: It seems to me, if your Honor please, that it is most material on the question of whether or not the defendant maintained an attractive nuisance, and if he built the bridge at a reasonable height, whether it can be assumed that the public is going to come up on the top of it.

Q. What was the highest point of the bridge?
A. It is twenty-two feet from center to center of cords. That

would be about twenty-seven feet or so, total height of structure, from the clearance at the bottom to the clearance at the top.

Q. That is, from the surface of the roadway?

A. No, about twenty-three feet from the surface of the roadway to the top.

Q. Now, then, those lateral top girders—I call them girders—I do not know the technical term. Will you tell us how big those biggest ones are?

A. Those going transversely of the iron?

Q. Parallel with the iron?

A. The top cord is what you refer to?

Q. Yes.

A. Twenty-four inch web. That is the height, and 27 inches wide at the top.

316 Q. So that forms a complete union, rectangular? That is, the top measurement is the same as the bottom measurement, and two sides are the same?

A. Precisely; the same, top and bottom, but slightly different, and the depth is the same on both sides.

Q. Will you tell us the angle formed by—I withdraw that—what do you call this portion of the bridge (indicating)?

A. The end post, or batter post.

Q. Can you tell us the angle of the batter post or end post?

A. You misunderstood my name. It is batter post. It is at an angle of 18 feet, about, horizontally, or 22 feet vertically. About the same as from the corners here at the side of the room to the center of the room at the floor. That is about the angle of it.

The Court: Are you talking about this trellis?

The Witness: No, we are talking about this batter post, the end post.

Q. So, the batter post it would be what degree with the ground, with the surface of the bridge?

A. I cannot give it to you in degrees.

Q. Approximately?

A. About fifty degrees.

Q. Can't you give us an illustration?

A. As I said, from the ceiling, at the wall, the center of the floor of this room. That is approximately the slope, about fifty degrees.

Q. Can you tell us the length of that batter post?

A. Twenty-eight and one-half feet between the measured lines, and 20 feet or so, total length.

Q. How was that built with respect to the rivets?

A. The rivets connect the cover plate, and connect it to the
317 angles there by making it work together, with the webs, and the bottom angles, as a complete compression member.

Q. What does that mean?

A. Well, a truss member, suitable to lock the compression in, as distinct from a tension member.

Q. But all that is done for the purpose of bearing the stress and the strain and the load?

A. Yes.

Q. Can you tell us whether, from your experience as an engineer this was standard construction?

A. Yes.

Q. And was?

A. Yes, is and was.

Q. Will you tell us the type of structure it crossed? What went across the bridge laterally, at the end near these batter posts?

A. The portal. The portal is a lattice portal.

Q. And how big is that lattice work?

A. Eight feet in depth from the top to the bottom, measured on the slant of the post.

Q. What would it be in a straight line?

A. That is what it is along the line of posts, the eight feet.

Q. What would it be on a straight line from the upper part, right down to the lower part?

A. That would be the same? Do you mean the vertical?

Q. Yes.

A. The vertical protection of that would be about seven feet.

Q. Is that picture a fair representation of that bridge?

A. So far as I can judge from a casual examination.

Q. Do you recognize it?

A. Yes.

Q. And would you say that picture conforms to the plan as you constructed it and approved it?

A. It appears to, with the exception of course that this arrangement for the wire is added later.

318 Mr. Carpenter: I offer that in evidence.

Mr. Curtis: It is offered, as I understand it, your Honor, to identify the balance below all the superstructure.

The Court: This witness recognizes that, and the defendant has the right to offer it.

Mr. Curtis: I object to the signs.

Mr. Carpenter: I do not offer it in respect to the signs.

Mr. Curtis: Will your Honor instruct the jury that the signs on the top of this superstructure are not offered in the picture?

The Court: That may be understood by the jury.

Photograph marked Defendant's Exhibit A.

The Court: Explain that to them.

Mr. Carpenter: Gentlemen, the witness identified this bridge as the continuation of his plan, and this portion of the structure which you see here, is what he described, except the overhead work, which was added later, to carry the wires. All the overhead work. He does not testify about signs.

Mr. Curtis: When was that taken?

Mr. Carpenter: June 14, 1916.

Q. Will you kindly give us that last measurement of this girder which you have been referring to?

A. Along the slope of the girder, or portal, it is a depth of eight feet.

Q. Eight feet?

A. Yes, sir, along the slope. That will be about seven feet, the horizontal projection or vertical projection, I meant.

Q. Can you tell us the width of the upper surface?

A. A 16-inch covered plate.

319 Q. Sixteen inches wide?

A. But set on a slope at right angles.

Q. This covered plate here is on a slope?

A. Yes, the side that shows in the picture is the higher side, which is lower in the back.

Mr. Carpenter: The witness indicates that the top surface of this is in a slope, the front side being higher than the rear of the plate.

The Witness: It would be at right angles to the slope of the batter post, which, as I illustrated, is from the corners of the room to the center of the room.

Q. Can you give us the width of the lateral top plates, that run lengthwise of the bridge at the top?

A. You mean at the trusses?

Q. I assume they are the same width. Up at the top here, the side plates that run lengthwise of the bridge?

A. Those are 26 inches wide.

Q. Now, referring to the cross bridging shown in the plan, which connect the outside pieces. Will you give us the dimensions of those? Just what you see in there? I am referring to the open trellis work that you see in the back of the front pieces?

A. Twelve inches wide.

Q. And how high are those cross bridging? What is the vertical height?

A. Seven feet in height, the whole span.

Q. What is the width of the bridge from outside girder to outside girder?

A. Fifty-four feet from center to center of the trusses.

Q. How much?

A. Fifty-four feet from center to center of the outside trusses.

Q. What is the length of the bridge?

A. About 270 feet.

320 Mr. Curtis: What is the right measurement?

The Witness: Two hundred thirty-two feet, total length.

Q. Is that bridge practically divided into two parts?

A. It might be called two parts. Two roadways and two sidewalks.

Q. And how about the overhead work?

A. It is divided into two parts, being over the roadway there. The sidewalk being carried by overhangs.

Q. Now, referring to this lattice work in here?

A. Yes.

Q. In referring to these supports that are not vertical, but placed in a slanting postion. How long are those? I am referring to these slanting supports that the witness has referred to, gentlemen of the jury?

A. Twenty-nine feet and three inches measured from center to center of the top and bottom cords.

Q. Now, did you have—I withdraw that—did you have anything to do, Mr. Keith, with designing the superstructure that carries the wires?

A. No, nothing to do with the electrical equipment.

Mr. Carpenter: That is all.

Cross-examination.

By Mr. Curtis:

Q. Just one question, Mr. Keith?

A. Yes, sir.

Q. Will you show me your diagram with regard to the length of the bridge? Will you show me where you get your measurements for length from this, please?

A. From the panel point here to the panel point here is twice 113 feet and 5¾ inches, plus twice one inch and 15/8 inches, and that makes 229 feet, and then I estimated the distance from that to the parapet, which would make it about 235 feet.

321 Q. That is from center to center?

A. From center to center of the pins.

Mr. Curtis: That is all.

Redirect examination.

By Mr. Carpenter:

Q. One question, Mr. Keith. I hand you this picture (handing photograph to witness), and ask you if that shows the two-fold division of the superstructure that you referred to?

A. Yes, there are two spans.

Q. And in this picture when you say spans, what do you mean by spans?

A. There was one span from there to here, for the truss, and then there is another one from there along this way, which does not all show.

Q. Is that practially equally divided?

A. Yes.

Q. Is it balanced equally?

A. Yes, the two spans are alike.

Q. Is that a fair representation of the bridge as it was designed and built?

A. In that part of it.

Q. What?

A. For that feature of it.

Mr. Carpenter: I offer that in evidence.

Mr. Curtis: I have no objection to it, with the exception, of course, as to the signs in the top of the picture and also the writing on the

back of it. I do not think that at *that* time that is proper, as to caution signs, and I object to that going before the jury.

Mr. Carpenter: I do not offer it for the signs.

Mr. Curtis: I also object to the writing on the back, "Caution Signs," &c.

322 The Court: Yes. Gentlemen of the jury, this picture is not evidence of any signs on the top of the bridge, nor any evidence of what is stated on the back of it. That you are not to consider.

Mr. Carpenter: These two jurors could not hear your Honor.

The Court: I said that picture was offered to show the mere outline and representation of the bridge, and was not evidence of any signs or notices in the superstructure, nor of what is endorsed on the back of it. You are not to consider what is written on the back of it, nor is it any evidence as to the sign.

Photograph marked Defendant's Exhibit B.

Mr. Carpenter: Gentlemen of the jury, the witness says that this second picture shows practically the two-fold divisions of the bridge, looking lengthwise of it, as being divided into two equal parts. This shows the other part (indicating).

Q. What is the length of those two sections?

A. One hundred thirteen and one-half feet, from center to center of the pins, and there are 2 feet and three inches between the pins, at the middle pier, and there is a little beyond the pin at each end.

Q. And the dimensions and supports were about the same on each part of the bridge?

A. Yes.

Q. Each half?

A. Yes.

Mr. Carpenter: That is all. Thank you very much, Mr. Keith.

Mr. Curtis: No questions.

323 JOSEPH J. DEEGAN, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Carpenter:

Q. What is your name?

A. Joseph J. Deegan.

Q. Mr. Deegan, are you employed by the New York, New Haven & Hartford Railroad?

A. Yes, sir.

Q. As claim agent?

A. Yes, sir.

Q. And how long have you been employed as such?

A. About seven years.

Q. And in June of 1916, you were employed in the same department?
A. Yes, sir.
Q. Here in the State of New York?
A. Yes, sir.
Q. On June 14, 1916, did you go to this bridge at 149th Street?
A. I did.
Q. Were you there with a photographer?
A. Yes, sir.
Q. Were you there when he took pictures?
A. Yes, sir.
Q. Of the bridge itself?
A. I was, sir.
Q. I hand you Defendant's Exhibit A (handing photograph to the witness), and ask you if that represents the condition of the bridge and superstructure together with the signs as you saw it that day?
A. Yes, it does.
Q. Isn't your picture shown in the bridge there?
A. Yes, sir.

Mr. Carpenter: The witness states that this picture shows the superstructure and the signs as they were when he was there on June 14th.

The Witness: June 14th.
324 Q. Do you remember what time of the day?
A. Why, I do not, really, Mr. Carpenter. The record may show that.

Mr. Carpenter: He states that this is a picture of himself down over there, gentlemen.
Q. Do you recall which way that picture is looking?
A. No. I think it is looking south, although I think it shows on the back of it, if you will permit me to look at it.
Q. If it will refresh your recollection, look on the back?
A. Yes, looking south.
Q. Would that be looking toward the river or the sound?
A. Yes, sir.
Q. I hand you Defendant's Exhibit B (handing photograph to the witness), and ask you if that shows the situation as it was that day, on June 14th?
A. Yes.
Q. Wait just a minute, please. In respect to the bridge and superstructure as shown?
A. Yes.
Q. Which way is that looking, please?
A. That is looking north.
Q. And the sign shown on the picture was there on that day?
A. Yes, sir.
Q. Was it there when you got there?
A. It was.

Q. Was the signs shown on Defendant's Exhibit A there when you got there?

A. They were.

Mr. Carpenter: Gentlemen, this lower picture is looking south toward the water, toward the river. These signs he said were there when he got there, and he says that this picture was looking north, away from the water and the river, and that this sign was
325 there when he got there (indicating).

(Defendant's Exhibits A and B shown to the jury by Mr. Carpenter.)

Mr. Carpenter: Gentlemen, you are not supposed to look on the back. That is not in evidence.

Q. I hand you this picture (handing picture to witness), and ask you if that shows the situation as it was with respect to the bridge and the superstructure, including the signs, when you were there that day?

A. Yes, sir.

Q. The signs were there when you got there?

A. Yes, sir, they were.

Mr. Carpenter: I offer that in evidence.

Mr. Curtis: We object to that, if your Honor please, on the ground that the witness has testified that this picture was taken on June 14th, and that there is nothing to show that so far as the record now stands that this sign, which they speak of, and which is shown in this picture, was there prior to June 9th.

Mr. Carpenter: I am trying to get to that, your Honor. I cannot prove all my case at once.

The Court: You had better wait until you can get some one that can identify that as a good representation at the time of the accident, or if there are any changes, let him explain it. Is this witness able to do it?

Mr. Carpenter: No, he was not there on the 9th.

326 Q. Were you there on the 9th?

A. No, sir.

The Court: Bring another witness.

Mr. Carpenter: May I have it marked for identification, your Honor?

The Court: Yes.

Photograph marked as Defendant's Exhibit C for identification.

Q. The two signs that you see in Defendant's Exhibit C, are those on the opposite end of the superstructure, where you see the two signs on Exhibit A?

A. Yes.

Mr. Carpenter: I think that is all, then.

Cross-examination.

By Mr. Curtis:

Q. Mr. Deegan, do I understand that you are now the claim agent for the State of New York for the New York, New Haven & Hartford Railroad Company?

A. I am now the claim agent of the Central New England Railroad, which is a subsidiary of the New York, New Haven & Hartford Railroad Company, and which is located at Poughkeepsie. I at that time was an investigator and adjuster at the New York office.

Q. This New England Railroad, is practically the same as the New York, New Haven & Hartford?

A. Yes, sir.

Q. And are you the head claim agent for that division?

A. Yes, sir.

Q. And in 1916, you were an investigator in the Claim Department?

A. In New York City here.

Q. Of the New York, New Haven & Hartford Railroad Company?

A. Yes, sir.

Q. Being stationed in New York City?

A. Yes, sir.

327 Q. Is that correct?

A. Yes, sir.

Q. Did you get this case for investigation?

A. No.

Q. When was the first that you heard of it yourself? The first day that you can recall having heard of this case?

A. Why, I suppose I heard about it the same day, or the next day, because all cases that come in, we hear about it, but that does not mean that they are assigned to us.

Q. Then your best recollection is that you heard about it either the same day or the next day?

A. Yes, sir.

Q. It was reported to your office by somebody?

A. By the regular routine; a telegraphic report.

Q. Made by whom?

A. I don't know.

Q. From what division, what official?

A. Most likely it would come from the superintendent's office.

Q. The superintendent of what?

A. The superintendent of the division.

Q. The road superintendent?

A. Yes, sir, the superintendent of the division.

Q. What does that mean?

A. It means that the division runs from the Grand Central Station or the Harlem River. I don't know whether this bridge was in the division.

Q. You mean the superintendent has charge of all of them on that particular division?

A. Yes, sir.
Q. And he would get that from some official under him?
A. Yes, sir.
Q. So it came through the regular channels?
A. It came through the regular channels.
Q. That there had been some accident in which the railroad was interested?
A. Yes, sir.

Mr. Curtis: That is all.
Mr. Carpenter: That is all.

328 EDGAR G. COLLINS, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Carpenter:

Q. What is your name?
A. Edgar G. Collins.
Q. Mr. Collins, what is your business with the New York, New Haven & Hartford Railroad?
A. Supervisor of high tension wires.
Q. Supervisor of high tension wires?
A. Yes, sir.
Q. And did this Harlem River and Port Chester Branch come under your jurisdiction in 1916?
A. Yes, sir.
Q. What position did you occupy in June of 1916?
A. The same as I am now, supervisor of high tension lines.
Q. The same position?
A. Yes, sir.
Q. Will you just state what your duties were at that time?
A. My duties were to see if there is any trouble or anything wrong with the wires, and that they are attended to all over the system.
Q. Maintaining them in condition to operate them?
A. Yes, sir.
Q. Did you learn of this accident on the bridge at 149th Street?
A. I did.
Q. Do you recall when that was that you heard of it?
A. The first I heard of it was on the morning of June 10th, I think it was.
Q. You heard of it on the morning of June 10th?
A. Yes, sir.
Q. What did you do then?
A. I went down to 149th Street bridge, to see if I could find any indication of any trouble around there, any boy burned.
329 Q. About what time in the morning was that on June 10th?
A. I left New Rochelle about 9:15 a. m.
Q. Did you come down by train?
A. Yes, sir.

Q. Did you come down by one of the regular trains, or a work train? A. A regular train. A passenger train.

Q. So that you got there, at the bridge, about what time?

A. About 10 o'clock. I had to walk from Cazenova down.

Q. Did you examine the bridge with reference to the appearance of the signs?

A. I did.

Q. State what you found?

A. Beg pardon?

Q. State what you found?

Q. You may answer what you saw about signs?

A. I saw a "Live Wire" danger sign on each bonnet. The bonnet is out on that part of the superstructure that carries the wires. I also saw a sign on each corner of the bridge, that is, on the bridge, to the bridge from the street.

Q. I hand you Defendant's Exhibit A (handing photograph to the witness), and ask you if that shows the signs on the north end of the bridge, as you saw them that day, on the bonnets and down below?

A. It shows the signs on the bonnet, and the sign which would be at the northwest corner of the bridge, and I cannot see the sign on the northeast corner.

Q. Was there one there?

A. Yes.

Q. But it does not show in the picture?

A. No, sir.

Q. That portion of the bridge is not shown in the picture?

A. No, sir.

Mr. Carpenter: Gentlemen, the witness refers to these signs
330 as being there that morning when he got there, but as not showing the one on the other side.

Q. I hand you Defendant's Exhibit C for identification (handing photograph to the witness), and ask you if that shows the sign on the southerly half of the structure on the bonnet as you saw them that day?

A. Yes, sir. You can see both signs on this picture, on the southerly half.

Q. Can you see three signs?

A. Yes, you can see three signs on there.

Mr. Curtis: Not what he sees now on the picture, but what he saw that day.

Q. Does this picture represent it as you saw it there that day?

A. Yes, sir.

Mr. Carpenter: Now, your Honor, it seems to me I may renew the offer of this in evidence, this witness was there on the morning of June 10th, about 10 a. m., and he says that these signs were there, and that it shows the condition as it was, and that is so close to the accident, that I contend it is sufficient now.

Mr. Curtis: We object to it upon the ground that it is a condition subsequent, unless connected by proper proof, as having existed at

the time or prior thereto, and on the further ground that it is not permissible evidence. This boy was hurt between two and three p. m. on the 9th.

The Court: I think it should go to the jury. It represents the morning after the accident, but it is a conclusion as to what might have been done between the time of the accident and his visit.

331 It would not be competent for the defendant to show that they had done anything.

Mr. Curtis: There is going to be a very sharp conflict on that, your Honor. The point is that this is a condition after the accident.

The Court: I think he may be permitted to testify that that was a true representation, as he found it the next morning.

Mr. Curtis: That is so, but I object to the exhibit as not being properly connected.

The Court: Objection overruled.

Mr. Curtis: We except.

The Court: Mark it.

Photograph marked Defendant's Exhibit C in evidence.

Mr. Carpenter: Now, your Honor, may I explain this to the jury, Mr. Deegan's testimony in reference to it?

Mr. Curtis: No, they heard his testimony, and I object to his summing up.

Mr. Carpenter: I am not going to sum up just what Mr. Deegan stated as to which way the picture was looking, and as to the signs when it was not received in evidence before.

The Court: Let this witness explain.

Q. Just explain which way this was looking?

A. This is looking in a northerly direction on the south side of the bridge, this is the sign on the bonnet. This is the west side and this is the east side (indicating).

Q. Which way would the water be?

A. On this side (indicating).

332 Q. At this end of the picture?

A. Yes.

Q. So when the boy came back from the water he would strike this part first, before the part shown in the back?

A. Yes, sir.

Mr. Curtis: I further object to the picture upon the ground that the portion of the bridge and sign shown is at the opposite end of the bridge from where the accident took place, and from where he ascended the bridge.

Mr. Carpenter: We contend there are four signs on that superstructure, which were there at the time of the accident.

The Court: I think the boy himself said there were four signs.

Mr. Curtis: He said on the ground, but not up there.

The Court: I will admit it.

Mr. Curtis: Exception.

Q. Now, Mr. Collins, this bridge sign, which is on the north end of the bridge, was that there when you were there that morning, too?

A. All these signs were in their positions, on the bonnet, on both sides of the bridge.

Q. And did they all contain the same words as shown in that picture?

A. Yes, sir.

Q. "Live Wires. Danger. Keep Off?"

A. Yes, sir.

Q. And on the northerly side of this bridge, on the opposite side, were there signs over in there, too?

A. Yes, sir.

Q. In the superstructure?

A. I don't know what you mean.

Q. How many signs were there, all told, in the superstructure?

A. Four, one on each post.

Q. One on each post?

A. Yes, sir.

333 Q. How about the signs that were down at the sides of the bridges, near the footpath, or the foot roadway. Were they the same type or not?

A. The same kind of signs, "Live Wire. Danger. Keep Off."

Q. How many of those were there when you got there?

A. Four.

Q. Where were they located?

A. One on each corner of the bridge.

Mr. Carpenter: That is all.

Cross-examination.

By Mr. Curtis:

Q. Now, Mr. Collins, you are responsible for the condition——

Mr. Carpenter: Just a minute.

Mr. Curtis: Yes.

By Mr. Carpenter:

Q. One other question, Mr. Collins, my assistant reminds me of a question, and I beg your pardon. Do you know, Mr. Collins, how long those signs have been there?

A. Why, to the best of my knowledge they were there since the branch was first electrified.

Mr. Curtis: I move to strike that out as not responsive.

The Court: Do you mean your recollection?

The Witness: Recollection. My recollection is that they were there right after they electrified the branch, after they electrified the Harlem River Branch.

Q. You say you were up there?

Mr. Curtis: I object to counsel repeating.

Mr. Carpenter: I want the jury to hear that.

Q. You say you were up there when that road was electri-
334 fied?

A. When we started the electrical operation.

Q. Tell us when you started the electrical operation?

A. The electrical operation was started on the Harlem River Branch in the latter part of July, 1912.

Q. Had you occasion to go over that branch in the course of your business?

A. Yes, sir.

Q. And about how often?

A. I am down over the branch every week. Once a week anyhow.

Q. Would you at times have occasion to make any inspection with reference to those signs?

The Witness: I do not inspect the signs personally every week or every day.

Q. Do you make an occasional inspection?

A. Yes, sir.

Q. About how often?

A. Once a month.

Q. This matter comes right under your jurisdiction?

A. Yes, sir.

Q. From that inspection about once a month, can you tell us whether or not those signs remained there after 1908, down to the morning you were there?

Mr. Curtis: I object to it as a conclusion of law and fact.

The Court: He can only state what he knows.

Mr. Carpenter: I think it is improper, and I will reform it.

Q. When you made monthly inspections when you were there yourself, were those signs there or not?

A. They were there.

Mr. Carpenter: Now, your Honor, I think that covers it.

335 Q. Mr. Collins, you are the gentleman who is responsible for the maintenance and the general condition of these electrical wires throughout this division, are you?

A. Yes, sir.

Q. And that division carries from where to where?

A. I have charge of everything in the electrical zone from New York to New Haven.

Q. And that is a distance of how many miles?

A. Seventy-three miles.

Q. And doesn't your jurisdiction cover any other track outside of the track from New York to New Haven?

A. No, sir.

Q. And this bridge that crosses that division that runs from New York to New Haven, is that right?

A. The division runs from the Harlem River to New Rochelle.

Q. This bridge crosses the tracks of that division which runs from New York to New Haven?

A. Well, some of them.
Q. What?
A. Some of them, I say.
Q. How many bridges have you over your railroad, between New York and New Haven?
A. Seventy-eight.
Q. Seventy-eight?
A. Seventy-eight.
Q. Will you tell his Honor and this jury, if you please, when you last personally examined the bridge at 149th Street before June, 1916?
A. Around the latter part of May, 1916.
Q. You remember that distinctly?
A. Yes, sir.
Q. Why?
A. Because I generally make an inspection down there around the latter part of the month.
Q. Not generally, but for any reason, do you remember this particular bridge, out of the seventy-eight bridges, in the last part of May, 1916?
A. Nothing particular about it, no, sir.
336 Q. As a matter of fact, you do not remember, when you yourself made an examination of this bridge, except that as a general custom you think you did examine it?
A. No, I do not think I did; I know I did.
Q. Tell us how you know it was the last of May when this particular bridge came under your observation?
A. It was part of my work to do that every month.
Q. Do you remember this bridge particularly in that month?
A. Yes, sir.
Q. What makes you remember this bridge out of your seventy-eight bridges particularly?
A. Because I go over the whole line down that way on the latter part of the month.
Q. As far as I can understand you, you remember the detailed condition of those bridges every month, is that right?

Mr. Carpenter: I object to that as argument.
Mr. Curtis: It is not argument. I am asking him if he does.
The Court: What was the question?

Q. As far as I understand you, you remember the detailed condition of those bridges every month, is that right?
The Court: Well, answer it.
The Witness: Yes, sir.
Q. And you can now tell us, can you, from your memory, what was out of order, if anything, with any one of those seventy-eight bridges in the month of June, 1916, can you?
A. I never found anything out of order on those bridges.
Q. I know you never have. I am asking you to answer my question. What was out or order, if anything, with any one of
337 those seventy-eight bridges?

A. I did not find anything out of order.
Q. I did not ask you that?
A. What?
Q. What was out of order, if anything, with any one of those seventy-eight bridges, in the month of June, 1916? Can you tell us that?
A. Yes, sir.
Q. And also for the month of July, 1916?
A. Yes, sir.
Q. Or for any other month?
A. Yes, sir.
Q. When you were there, as you say you think you were, in May, did you examine with great particularity these different signs?
A. I looked to see if the signs were there on the bridge.
Q. You remember being there?
A. Yes, sir.
Q. And you remember looking at each and every one of them?
A. Yes, sir.
Q. In the month of May?
A. Yes, sir.
Q. How were they fastened on?
A. In a cable way, with special bolts.
Q. What were the signs made out of?
A. Made out of wood, just as they were on top.
Q. Wood?
A. Yes, sir.
Q. You thought it was necessary, did you——

The Court: We do not want to go into his thoughts.
Mr. Curtis: Because I am going to ask——
The Court: You may ask, if you can disclose it, and make him contradict himself. If you can, but going into the processes of his mind, about what he thought, is improper.
Mr. Curtis: I am not asking him that at all. I will put it this way.

338 Q. You did look particularly at these signs in May?
A. Yes, sir.
Q. On every one of the bridges?
A. Yes, sir.
Q. And you remember them?
A. Yes, sir.
Q. When you got there it was the last of May?
A. Yes, sir.
Q. Is that right?
A. That is right.
Q. And you got a notice that something had happened on this bridge, did you?

The Court: He has already said he went there after he got the report.
The Witness: I told you that.
The Court: It is not very material.

Mr. Curtis: I think it is material.
The Court: Very well.

Q. When you got to the bridge on the morning of June 10th——

The Court: He said what date it was.
Mr. Curtis: I have not finished my question, sir.
The Court: Are you going to try to disprove that?
Mr. Curtis: I am not going to be bound by what he says on the direct-examination, any more than my friend is going to be bound by what I say on the direct-examination.
The Court: Go on.

Q. When you got to the bridge on the morning of June 10th, did you immediately look at the signs?
A. I looked all over the bridge, signs and all.
Q. Did you look at the signs?
A. I looked at the signs.
Q. You have seen those there only the last part of the month before?
A. Yes, sir.
339 Q. So you looked up there when you got there on June 10th, to see if they were there?
A. Yes, sir.

Mr. Curtis: That will be all.

By Mr. Carpenter:

Q. Do you keep a record of any defects in any of the structures that you inspect monthly?
A. I make notes of it.
Q. What is that?
A. I make notes of it, to have it reported, on a scratch book, and they are reported and repaired.

Mr. Curtis: I move to strike out that they are repaired, as a conclusion of the witness.
The Court: Did you see them repaired?
The Witness: No, I made a note, a memorandum of it, and had them repaired.
Mr. Curtis: That is the same thing. On the ground that it is a conclusion, I ask to strike it out.
The Court: I don't know whether he does know this.
Mr. Curtis: That is what I am objecting to.
The Court: That would not be competent. Strike that out.

By Mr. Carpenter:

Q. As the result of the record you keep, you would be able, by referring to those records, to testify as to any defect, would you not?
A. I would, yes.
Q. Have you any record of any defect on that bridge in respect to these signs?

A. None whatever.
Q. On June 9, 1916?
A. No, sir.
Q. Or thereabouts?
A. No, sir.
340 Q. Over these rails that are beneath this bridge, will you tell us whether through trains from New Haven to the Pennsylvania station are operated?
A. Yes, sir.

Mr. Curtis: We object to that as immaterial.
The Court: Objection sustained.
Mr. Curtis: Parlor cars?
Mr. Carpenter: Now, if the Court please, I offer it. I am sorry if it disturbs Mr. Curtis.
Mr. Curtis: It doesn't.
The Court: It distresses me.
Mr. Carpenter: If the Court please, one of the important points in this case is the nature of the defendant's interest in this bridge.
The Court: Do you say it would be competent, as to whether the defendant operated its trains on time?
Mr. Carpenter: Not at all.
The Court: That seems to be about what it is.
Mr. Carpenter: Not at all. I am going to show that this was a branch of the New Haven Railroad, and I am going to ask your Honor to take judicial notice that in 1903, the law of the State of New York compelled the New York, New Haven & Hartford Railroad, and the New York Central Railroad, to electrify their system on Park Avenue, down through New York City to the New York terminal, and as the result of that, this Harlem Branch, being operated as part of the same system, it then became neces-
341 sary to electrify that, and as the result of that the electrical devices were put in, and this bridge was constructed under a contract with the City of New York which defines the railroad obligation with respect to the maintenance of that property. You have to get the history of the whole contract.
I have a right to show the history, and it is for this jury.
The Court: I think they will admit all that, that it was in conformity with the ordinances, and with all the requirements of the legislature of the State of New York.
Mr. Curtis: Yes, sir. Our claim here is that they did not maintain it properly and carefully, that is all.
Mr. Carpenter: May I show by this witness, your Honor, that this branch, where this bridge was, was operated as a part of the New Haven system?
The Court: Yes.

Q. Will you answer that question?
A. Yes, sir.
Q. It was operated as part of the New Haven system?
A. It was.
Q. And when the New Haven main line—I withdraw that—can

you tell us when the New Haven main line running into the Grand Central station was electrified?

Mr. Curtis: I object to that as utterly incompetent and immaterial.

The Court: I do not think it has anything to do with the case. Are you going on the theory that this boy was a trespasser?

342 Mr. Carpenter: Yes, sir.

The Court: You are?

Mr. Carpenter: I am, or at the most, a bare licensee.

Mr. Curtis: I want to bring to the Court's attention the fact that this bridge was a public bridge, which did not belong to the New York, New Haven & Hartford Railroad Company. We had a right there.

Mr. Carpenter: That is what I want to prove.

Mr. Curtis: You do not need to prove it. We agree on that, that it is a public bridge.

The Court: That is in the record.

Q. My simple question is, whether this branch was electrified subsequent to and as a part of the main line?

A. Yes.

Mr. Carpenter: That is all I have to ask this witness.

Mr. Curtis: That is all.

THOMAS TOBIN, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Carpenter:

Q. What is your name?

A. Thomas Tobin.

Q. Mr. Tobin, you are employed by the New York, New Haven & Hartford Railroad Company?

A. Yes, sir.

Q. On the Harlem Division?

A. Yes, sir.

Q. What is your business?

A. Inspector.

343 Q. What was your business in June of 1916?

A. I was in charge of construction. Oh, I was an inspector then.

Q. An inspector?

A. Yes, sir.

Q. Are you familiar with the 149th Street bridge, of the Port Chester & Harlem River Division?

A. Yes, sir, I am.

Q. Did you have charge of any of the construction work there?

A. Not at that time.

Q. Did you have anything to do with the installation of any signs on the 149th Street bridge?

A. Yes, sir, I did.

Q. Tell us what that was?

A. Just at the time that the New York, New Haven & Hartford Railroad started operating on the Harlem River Branch, I was working in another department, for McHenry & Murray, engineers. We were installing that part of the construction of that road throughout, and we had turned the main line over to operation, and we were then building the lines quite adjacent to the main line, and our men were used to install those signs. We were ordered by another department to install them.

Mr. Curtis: I object to all that.

The Court: Yes. Tell what you did.

Q. You got orders to install the signs?

Mr. Curtis: I object to that.

The Court: It would be assumed that he did, or he would not probably go down there and do it, on his own account. I do not see that it is material, one way or the other.

Q. What did you do after you received some word?

A. We identified certain men to go over these bridges and
344 cover the places designated, and at the places designated we ordered these men to install these signs at the different places.

Mr. Curtis: That I object to as secondary evidence.

The Court: Were those danger signs installed on all the bridges?

The Witness: Yes, sir.

The Court: And you know that?

The Witness: I know that.

Q. Will you tell us, please, the date when they were put on the 149th Street bridge, or thereabouts?

A. In the fall of 1912.

Q. Did you have occasion thereafter to make any inspection—I withdraw that—how many were put on there?

A. There were eight signs installed altogether on that bridge.

Q. And where?

A. Four signs installed on the bonnets, at the foot of the bonnet, on top of the bridge girder, and four signs installed on the walkways, on the bridge.

Q. I hand you Defendant's Exhibits A, B, and C (handing photographs to the witness), and ask you if they show the way they were installed on the bonnet?

A. That shows the way they were installed on the bonnets, yes, sir.

Q. Does that show the way one of the signs was installed on the side of the footpath?

A. Yes, sir.

Q. I hand you Defendant's Exhibit B (handing photograph to

the witness), and ask you if that shows the way that sign was installed on the bonnet?

A. Yes, sir.

Q. I hand you Defendant's Exhibit C (handing photograph to the witness), and ask you if that shows the way the signs were installed on the bonnet at that time?

A. Yes, sir.

345 Q. Thereafter, after the installation, did you have occasion to make any inspection of this bridge with respect to signs?

A. I cannot just remember.

Q. What?

A. We never made any particular trip, to inspect signs there.

Q. Did you ever get any orders to replace any thereafter?

Mr. Curtis: I object to that.

The Court: Objection sustained.

Mr. Carpenter: Exception.

The Court: It is not what he got orders to do, but what he did.

Q. Did you thereafter ever put up any signs as shown on that bridge, in the places indicated by the photographs?

A. No, sir.

Q. Do you recall if at any time after the installation of them, you saw those signs subsequently?

Mr. Curtis: I object to that as already answered.

The Court: Is your answer that you do not remember it?

The Witness: I never made any trip to inspect the signs, but I did see the signs afterwards.

Q. Did you ever do any work on that bridge?

A. Not before the accident, but after the accident, I saw the signs on that bridge.

Q. How long after the accident was that, Mr. Tobin?

A. I believe it was the day after.

Q. Were you there with Mr. Collins when the inspection was made?

A. No, sir, I was not.

Q. How did you come to go there the day after?

A. I was sent from our office.

The Court: Is that material?

346 Mr. Carpenter: Well, in the same way that Mr. Collins' testimony was material. It shows the situation immediately after.

The Court: The fact, if it is important at all, is whether they were there or not.

Q. The day after this accident, on June 10th, what time were you there?

A. I was there about 11 o'clock, I should say.

Q. What did you see in respect to the signs?

A. I saw the eight signs on the bridge, in place.

Mr. Carpenter: That is all.

Cross-examination.

By Mr. Curtis:

Q. How long have you been working for the Railroad Company, Mr. Tobin?

A. I have been working for the Railroad Company directly for the past six years, and indirectly for four years prior to that.

Q. And in the course of your experience, either direct or indirect, how many times have you testified in Court?

A. Why, I believe on one case about three or four times.

Q. That is the Fried case?

A. Yes, sir.

Q. And that was the man that had both arms burned off?

Mr. Carpenter: I object to that. We are not trying that case.

The Court: Objection sustained.

Q. What other case?

Mr. Carpenter: I object to what other case he has testified in.

The Court: Were you subpœnaed to Court?

The Witness: I was subpœnaed to Court.

Q. You received a subpœna? You say you were subpœnaed?

A. Yes, I was subpœnaed or ordered to Court, which is the same thing.

347 Q. Oh, it is. To you an order from the company is just as good as a subpœna from the Court?

A. I imagine so, yes.

Q. I agree with you. But how many times have you testified in other cases?

A. I have not been in a court room over three times in my life outside of that.

Q. Outside of that?

A. Yes, sir.

Q. About three or four times in that case?

A. Three or four times in that case.

Q. You always testify in those cases that the wires and signs are all right, don't you, all of them?

The Court: That would entitle the defendant to come back with something, and to go into another record of that case, because you had opened the door there, and brought it out, to refute it. There is nothing in the direct-examination about any other case. Therefore your cross-examination is entirely improper, not to say irrelevant.

Mr. Curtis: I have a right to show that.

The Court: No, you have not.

Mr. Curtis: I respectfully disagree with the Court.

The Court: Take an exception.

Mr. Curtis: I do take an exception.

Q. Have you ever testified in that case that anything was wrong with the wiring system or with the signs?

Mr. Carpenter: I object to that as incompetent.

The Court: You need not answer that question. The fact that the witness is called in one case, to tell what he may know
348 about the case, is that anything to his discredit? If you can show he is guilty of perjury, or of contradicting himself in the case, or that he has any interest in it, you can show that.

Mr. Curtis: I say he is an employee of this defendant, and has been in Court for them before, and that it is all for the jury's consideration.

The Court: Yes, the jury can consider that, but you cannot go into his testimony in other cases.

Mr. Curtis: I am not going into the testimony in other cases. I am asking him, in one general question, if he ever testified that everything was not in good order.

The Court: It is immaterial how many times he has been in Court, and what evidence he has given. I will sustain the objection.

Mr. Curtis: Exception.

Q. Will you tell this jury when you last remember seeing any signs on the 149th Street bridge?

A. That was the day after the accident.

Q. Before that, when did you ever see any? When did you ever see any signs on that 149th Street bridge before that?

A. I saw those signs on the 149th Street bridge shortly after they were installed.

Q. When do you say that was, in 1912?

A. In 1912.

Q. So that between 1912, and the day after the accident, you do not remember ever seeing them?

A. Why, I do not remember ever seeing them.

349 Q. When you went down there, are you sure it was the next day?

A. I am quite positive it was the next day.

Q. What makes you positive of it?

A. Because it was on a Sunday.

Q. That you went down there?

A. That I went down there.

Q. Well, the accident happened on a Friday?

A. I took my boy down with me, and that is how I happened to know.

Q. Then it was two days after?

A. Well, maybe two days after.

Q. When you went down there, you did not look to see if the signs were there or not, did you?

A. That was my intention.

Q. What?

A. That was my purpose in going down there.

Mr. Curtis: That is all.

Mr. Carpenter: That is all.

The Court: Gentlemen of the jury, the same instructions I gave you yesterday, about discussing the case, you will observe until the end of the trial. We will adojurn now until 10 o'clock tomorrow morning, gentlemen. You can go.

Adjourned to Thursday, August 19, 1920, at 10 a. m.

350 New York, August 19, 1920.

HENRY O'NEILL, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Carpenter:

Q. What is your name?
A. Henry O'Neill.
Q. Mr. O'Neill, you are employed by the New York, New Haven & Hartford Railroad Company?
A. Yes, I work for the New York & New Haven.
Q. Were you in 1916 so employed?
A. Yes.
Q. What was your position?
A. Assistant foreman of car repairs.
Q. At the Oak Point shop?
A. At the Oak Point shop.
Q. How far is that Oak Point shop, or was it, from the 149th Street bridge?
A. From where I was working, about two blocks, two city blocks.
Q. Were you at the scene of the accident on or about the time of the accident?
A. No.
Q. Did you go near the 149th Street bridge at any time on that day?
A. Yes.
Q. In June of 1916?
A. Yes.
Q. Did you see the boy?
A. Yes.
Q. Where was he when you saw him?
A. On the roadway.
Q. You mean the roadway of the bridge?
A. On the bridge, yes.
Q. Near which end, or was he in the middle, or where was he?
A. He was about thirty-five feet from the east end of the bridge.
Q. The east end?
A. Yes, toward the river side, that is.
351 Q. On which end?
A. On the river side.
Q. Where was he? Was he lying there or was he being carried, or what?

A. Was he what?

Q. Was he lying there or being carried?

A. He was lying there, and there were three or four boys picking him up and trying to carry him around.

Q. And you say he was about thirty-five feet from the east end of the bridge, would you say the river side end of the bridge?

A. The east end of the bridge there.

Q. Do you mean near the sound, or nearer the Southern Boulevard?

A. Near the Sound.

Q. Near the Sound?

A. Near the Sound.

Q. He was there then when you got there and saw him?

A. There was only about three or four boys.

Q. And the boy was lying on the bridge?

Mr. Curtis: I object to this?

Mr. Carpenter: I withdraw it.

Q. What did you do after that?

A. I seen the boys fooling with him, I thought they were fooling with him, and they were carrying on, and one of them called me over, and they said——

Q. Never mind what they said. Just tell us what you did after that?

A. I went over and picked the boy up.

Q. What did you do?

A. I brought him over to the Boulevard, or part way. Carried him over.

Q. To the Southern Boulevard?

A. To the Southern Boulevard to 149th Street.

Q. Did you carry him all the way?

A. No, there was another man, I don't know who he was, helped me.

Q. What did the other man do?

352 A. He took him from me over near the Boulevard, about one block from the Boulevard.

Q. How did you happen to go to the Bridge at that time on that day?

A. Going home from work.

Q. To get to your home did you have to cross that bridge?

A. Yes, sir.

Q. How long had you been doing that during 1916?

A. The whole year.

Q. The whole year?

A. Yes, sir.

Q. Now, can you tell us what the condition was on that bridge in 1916, on this day in June, when you arrived there with respect to signs?

A. I did not see nothing.

Q. You did not see anything?

A. No, sir.

Q. You did not look for any signs?
A. Yes.

Mr. Curtis: I object to that as leading. The form is bad.
The Court: Objection sustained.

Q. Did you at any time during June observe what the condition was with respect to signs?
A. There were signs at both ends and both sides of the bridge.
Q. How many were there all told?
A. Well, I took notice of six or eight.
Q. What did it say on the sign?
A. It says, "Danger. Keep Off. Live Wires."
Q. Do you know, can you recall whether you saw any change made on that bridge with respect to those signs from that time on?
A. No.

Mr. Curtis: That we object to.
The Court: That would be a conclusion. All you want to ask the witness is just what he saw.

Q. Thereafter, what did you see from that time on with respect to signs?

353 Mr. Curtis: That we object to.
Mr. Carpenter: I am referring to this time in June, 1916.
Mr. Curtis: That I object to as subsequent to the accident.
The Court: If it was the next day you are talking about you might ask him, but you cannot go longer than that, because if it is merely an inference, the jury can draw it, as to what might have been there the day before.
Mr. Carpenter: I guess I have gone far enough on that.

Q. Can you tell us, please, where those signs were located?
A. There were two. There was one each end, on the east end, and there was one—two on the east ends and two on the east and two on the west end of the bridge. I seen them there for two years.
Q. Where were they with respect to the roadway, and with respect to the superstructure of the bridge?
A. To the roadway, and to the footpath.
Q. And were the other two that you referred to of the six or eight, where were the other two?
A. On the bridge.
Q. Now, then, you placed how many of them?
A. I should say six or eight. I am sure there were six.
Q. You are sure there were six?
A. Yes.
Q. Handing you Defendant's Exhibit A, can you say if that picture shows the signs?
A. Yes.

Mr. Curtis: I object to that.

Q. I ask you if that picture shows you the locations of the signs as you saw them in 1916? Do you understand?

354 Mr. Curtis: I object to the witness being shown that paper as highly improper, in view of the testimony just given.

The Court: If that correctly represents the picture, the photograph of the bridge, and he is able to identify that bridge and he has testified about there being certain signs on the bridge.

Mr. Curtis: He could not locate only four of them, and he said they were on the roadway, and then Mr. Carpenter says, "I show you a picture; here is the sign. Is that the sign?"

The Court: It might be that he could not locate them exactly, but after seeing the photograph he may be able to tell where they were.

Mr. Curtis: If I show him a picture of a horse, of course, he could say, "Here is a horse."

The Court: All that you are trying to find out from this witness is whether there were any signs on that bridge.

Mr. Carpenter: And whether that correctly represents the situation.

The Court: Can you do it from memory?

The Witness: Yes, sir.

Q. Where were they?

The Witness: There was one on the south side, as you go on the approach, there was one on the north side, on the east end, and the same on the west end.

Q. Does that picture represent fairly the situation as to the signs, as you saw them?

A. It does.

355 Mr. Curtis: Will you please point those out on the picture to the jury, the same as you showed his Honor?

(The witness does so.)

By Mr. Carpenter:

Q. Now, you point out the signs on the sides of the bridge.

A. Yes.

Q. Was the situation the same at the other end of the bridge?

A. The very same.

Q. That makes four?

A. That is four, yes.

Q. Now, tell us where the others were?

A I never took very much notice of the others.

Q. Can you tell us about where they were?

A. Right about in the center of the bridge.

Q. To the best of your recollection how many were there in the center of the bridge?

A. To the best of my recollection there were four.

Q. Four?

A. Yes, sir.

Q. But you cannot tell us exactly where they were?
A. No, I cannot.
Q. Were they above the roadway, or not?

Mr. Curtis: I respectfully submit, if your Honor please, that that is highly improper, and leading.

Q. About how far to the best of your recollection were they above the roadway?
A. About fifteen feet.

Mr. Curtis: I object. How absurd it is to say to a witness, were they above the roadway, and then say, I withdraw it, and then say, how far above the roadway were they?

The Court: Objection overruled. But avoid leading the witness, because it does not appear that he needs leading questions. He is acquainted with the situation for four years. Ask him where
356 they were, but do not suggest to him where they might be, so as to recall it to his memory.

Q. Do you follow his Honor's suggestion? Tell us where those other signs that you have referred to were, or about where they were?

The Court: All this could have been avoided by showing the picture to the witness before he was put on the stand, and having him refresh his memory, and going over matters that could have been attended to last afternoon. I do not know what counsel were doing in the interval, but probably they were engaged in other important matters, and the Court has to be taxed with delay as a consequence.

Q. Tell us about where the other signs were that you have in mind?
A. I should judge they were about 16 feet or 15 feet.
Q. From where?
A. From the roadway.

Mr. Carpenter: That is all.

Cross-examination.

By Mr. Curtis:

Q. How many years have you been employed by the New York, New Haven & Hartford Railroad Company?
A. Thirty-four.
Q. You were crossing this bridge for about a year before this accident?
A. Three or four years.
Q. And were there many other employees of the company that used that bridge every day?
A. What is that?
Q. And were there many other employees of the company that used that bridge every day besides yourself?
A. Yes, sir.

357 Q. About how many, on a general guess, would you say were using it every day?
A. Twenty or twenty-five.
Q. They would come there in the morning, and go back at night?
A. They would go out for their lunch.
Q. And then maybe come back again and go home when their work was over?
A. Sometimes.
Q. Some did and some did not?
A. Yes.
Q. You did not see this boy hurt, did you?
A. No.
Q. Did anybody tell you that the boy had been hurt?
A. What is that?
Q. Did anybody tell you that the boy had been hurt on the bridge?
A. No.
Q. Did anybody come and tell you that there was a boy hurt on the bridge?
A. No.
Q. You don't know when the boy was hurt, do you?
A. No.
Q. You don't know how long before you got there he was hurt, do you?
A. No.
Q. The boy was there all right, wasn't he?
A. He certainly was.
Q. Did he seem to be hurt?

The Court: Why should you ask him about seeming.

Q. Was he hurt?
A. Of course he was hurt.
Q. Could you see whether his arm or his hand was bleeding and cut?
A. I know he was cut, because when I took him up, by the arms, when I gave him to this man, there was blood upon my hand.
Q. Did you examine his arm at all?
A. I did not.
Q. He was not able to walk?
A. No.
Q. You had to carry him?
A. I had to carry him.

Mr. Curtis: That is all.
Mr. Carpenter: That is all.

358 ANTONIO POSCI, called as a witness in behalf of the defendant, being duly sworn, testifies as follows:

Direct examination.

By Mr. Carpenter:

Q. What is your name?
A. Antonio Posci.
Q. You are employed by the New York, New Haven & Hartford Railroad Company?
A. I am, sir.
Q. How long have you been so employed?
A. 1905.
Q. What was your position in 1916?
A. In 1916 I was patrolman.
Q. For this railroad?
A. Yes, sir.
Q. Are you acquainted with the 149th Street bridge?
A. Yes, sir.
Q. Are you still acting as patrolman?
A. I am lieutenant of police at the present time.
Q. For the New York, New Haven & Hartford Railroad Company?
A. Yes, sir.
Q. Have you ever been up on the 149th Street bridge?
A. Yes, sir.
Q. Frequently or not?
A. Sir?
Q. Frequently or not?
A. Every day.
Q. And was that in your beat during June of 1916?
A. It was, sir.
Q. And during other parts of 1916?
A. Yes, sir.
Q. Have you ever seen any boys playing around that bridge?
A. Yes, sir.
Q. Tell the Court and Jury where you saw them at various times?
A. Sir?
Q. Tell the Court and Jury where you saw them at various times?

359 A. Why, during the summer months, especially, they are going down to the river front and swimming, and on the way home they start to play on the bridge, and I see a number of boys climb four feet, five feet, way up, when they are going home, and we try to reprimand them, and we do not want to lock them up, but they would go somewhere, and we do not want to give the boys a police record. They are too small.

Q. Have you ever had occasion to chase any of them off this bridge?
A. Yes, sir.
Q. How many, about?
A. Oh, sir, I couldn't say. This has occurred several times.

Q. Have you, during the time you have been down there, seen the bridge and noticed any signs there?
A. Yes, sir.
Q. Will you tell us what the situation was in 1916, if you can recall?
A. Yes, sir, there is two signs on each end of the bridge. There is a footway. One at each end, one passing the river front.
Q. When you say each side, do you mean each end of the bridge?
A. Each end of the bridge, and four is right on top of the span itself.
Q. How long has that condition existed with respect to time?
A. Why, to my knowledge, since 1915.
Q. Are you still employed by the railroad?
A. I am.

Mr. Carpenter: That is all.

Cross-examination.

By Mr. Curtis:

Q. Now, Lieutenant, let us see if I understand you?
A. Yes, sir.
Q. What district, or what territory did your post as a patrolman cover in 1916?
A. Yes, sir.
360 Q. What territory?
A. Between the Harlem River and Oak Point.
Q. What distance is that?
A. Why, I should say about two miles.
Q. Two miles?
A. About two miles.
Q. And you patrolled and the other patrolman patrolled along that distance besides you?
A. Yes, sir.
Q. How many?
A. There was one located at the yard and one at the 149th Street bridge.
Q. You mean the Oak Point yard?
A. Yes, sir.
Q. How far is that from the bridge?
A. Part of the yard is located underneath the bridge and part of it is located between 149th Street and Lincoln Avenue.
Q. Part of the yard came right underneath the bridge?
A. Yes, sir.
Q. And sometimes workmen were around there?
A. Yes, sir.
Q. And brakemen?
A. Yes, sir.
Q. And switchmen?
A. Yes, sir.

Q. And when did you first commence to patrol the district in which this bridge lay?

A. 1915.

Q. And did you notice that at that time the boys used to climb up on the bridge structure?

A. In 1915, not right on the bridge.

Q. Did you, in 1915, ever get any boys climbing up on the structure, part of the way up?

A. No, sir.

Q. Anyway at all?

A. No, sir.

Q. When was it you noticed these boys had climbed up four or five feet; when was that? What year?

A. Why, 1916, and 1917, mostly every day.

Q. Mostly every day?

A. Yes.

361 Q. Did you ever notice them at all in 1915?

A. Sir?

Q. Did you ever notice them at all in 1915?

A. Why, yes.

Q. And in the warm weather they would come along there and some of them would climb up four or five feet, either way?

A. Yes.

Q. Most every day?

A. Not most every day.

Q. I thought that was what you said, didn't you?

A. Well, mostly every day.

Q. What?

A. Yes, they were going down the street.

Q. Not every day but mostly every day?

A. Well, mostly every day.

Q. I see the difference. And some of these were little fellows?

A. The majority were little fellows.

Q. And they were so little that you did not want to arrest them?

A. Sure enough.

Q. And you felt so good, you had such a good feeling about it, that you felt sorry for the little fellows?

A. Many a time I took them home to their mothers.

Q. Tell us one that you ever took home to his mother?

A. I could not tell you the mother off-hand.

Q. Tell us the house?

A. In 163d Street, and I brought him home from 149th Street to 163d Street.

Q. Tell us the number in 163d Street?

A. If I do not mistake, it is 1209 Garrison Avenue.

Q. What was the name of the people?

A. I don't know the names.

Q. Is the mother of that little boy here?

A. Sir.

362 Q. Is she here?

A. No, sir.

Q. Is the little boy here?
A. Why, no, sir, not that I recognize.
Q. You heard about this accident, didn't you?
A. I did, yes.
Q. When were you there after it happened?
A. The second day after.
Q. And did you tell——
A. Not the second day after, the very same day, about five or six o'clock.
Q. The very same day?
A. Yes.
Q. And in the course of time an investigator from the railroad came and asked you what you knew about these things?
A. He did not.
Q. He never asked you a thing?
A. No, sir.
Q. You never talked to a soul about it?
A. No, sir.
Q. So when you got on the stand here today, that was the first time that anybody living knew what you were going to testify?
A. Why, sure.
Q. You understand what I ask you?
A. Yes, sir.
Q. You never told what you have testified to here to an investigator, of the company, at any time?
A. You asked me if I know that the signs had been there since 1916.
Q. Didn't I ask you if you were asked by the investigator for this company what you knew about this case?
A. Yes.
Q. And didn't you say that nobody ever asked you?
A. About the bridge, yes.
Q. Do you take that back?
A. Yes.
Q. They did ask you?
A. Yes, they did ask me, sure.
Q. They asked you about this accident?
A. Yes.
363 Q. Did you tell them about taking any little boy home?
A. No.
Q. What do you say this number is, twelve hundred and what?
A. I believe it is 1209 Garrison Avenue.
Q. And what were these people?
A. Jewish.
Q. Jewish people?
A. Yes.
Q. You have not gone up there since this trial was on to find any of them?
A. No, sir.
Q. At that time did you wear any uniform?

A. No, we do not wear a uniform.
Q. Did you then?
A. No, sir.
Q. And did you ever report to your superiors that little fellows were climbing this bridge?
A. Yes, sir.
Q. You are sure you did?
A. Positively.
Q. How many times? Many times?
A. Yes, sir.
Q. And that you thought it was dangerous?
A. What?

Mr. Carpenter: I object to it.
Mr. Curtis: I withdraw it.
The Court: I sustain the objection.
Mr. Curtis: I say, I withdraw it, your Honor. I won't press it.

Q. Did you make those reports orally or in writing?
A. Well, in the case of the wires I make it in writing, in the case of taking the boy home I explained the matter to the Captain.
Q. I ask you to tell this jury whether you ever arrested a boy for climbing this bridge?
A. No.
Q. Then I ask you again, in these reports that you made about these boys climbing this bridge, did you make them orally or in writing, or how?
A. In the case of an arrest, I made them in writing, and in case of chasing the boys——
364 Q. Will you answer my question?
A. Yes.
Q. You say you never arrested a boy for climbing the bridge?
A. No, sir.
Q. Then, with regard to the reports, as to the boys climbing the bridge, did you make those in writing?
A. No, sir.
Q. But you reported it to your captain?
A. Yes, sir.
Q. Who is he?
A. William Colby.
Q. Do you know whether he is in the employ of the railroad yet?
A. He is.
Q. When you worked there in 1916, I suppose you looked at the bridge to see what signs were on it?
A. Why, of course.
Q. That was one of the first things you did?
A. Not the first thing I did.
Q. I say, it was one of the first things?
A. One of the first?
Q. Yes.
A. No, sir.
Q. What was the first thing you did?

A. Why, I don't remember now what was the first thing.
Q. But you immediately looked to see where the signs were?
A. Why, a blind man could see them.
Q. I did not ask you that, Mr. Posci, did I?

Mr. Carpenter: I think that is a good answer.
Mr. Curtis: I think it is a very foolish answer, in view of the railroad's defense.
The Court: What are you trying to prove by it?
Mr. Curtis: To show whether the jury believes it or not.
The Court: You are laying more stress on the question of signs there than I think is warranted.
Mr. Curtis: I think so myself. That is all.

365 Redirect examination.

By Mr. Carpenter:

Q. Will you come down here, please and show the jury with this pencil where you have seen those boys playing on the bridge?
A. Yes, sir. Gentlemen, I saw the boys on this pathway here, and I seen the boys climb here, but I seen them mostly every day, as I said, climb here (indicating).
Q. Had you ever seen them sliding down?
A. Yes, sir.

The Court: Make a pencil cross there, on that particular trellis, that you saw them sliding on.

(The Witness does so.)

Q. Where had you seen them sliding down?
A. Down here (indicating lowest pencil mark on Exhibit A).
Q. Show the jury?
A. Down here and down this end here, and down this way, and over by the edge, here (indicating).
Q. Now, had you ever seen any boy up in these struts?

Mr. Curtis. I object to that, if your Honor please. I think it is not proper redirect.
The Court: That seems to be proper examination in chief.
Mr. Curtis: Yes, sir.
The Court: You are now going on to something else, that was not inquired into.
Mr. Carpenter: That is all.
Mr. Curtis: I move to strike out the answer.
The Court: Yes.

366 EDWARD MCNALLY, called as a witness in behalf of the defendant, being duly sworn, testified as follows:

Direct exmination.

By Mr. Carpenter:

Q. What is your name?
A. Edward McNally.
Q. Mr. McNally, what is your business?
A. Patroling the yards at Oak Point
Q. What yard?
A. The Oak Point yard, in one yard.
Q. What was your position in 1916?
A. Patrolman in one yard.
Q. What is that patroling in one yard.

Mr. Curtis: He means the No. 1 yard

Q. Where is Yard No. 1, with reference to the 149th Street bridge?
A. It is at the 149th Street bridge itself.
Q. Where is it with reference to that?
A. Well, it runs over from 1 to 2.
Q. Is it near part of the 149th Street bridge?
A. Why, it runs directly under it. The railroad tracks run under it.
Q. In the course of patroling that yard, have you ever seen any boys on that bridge?
A. Oh, Lord They gave me more trouble than the men around the yard.
Q. They do what?
A. They gave me more trouble than the men around the yard.
Q. Have you ever had occasion to chase them off?
A. Oh, Lord Yes. If I see a little tot up there, I would go up and advise him and tell him the danger.
Q. Tell us where you have seen them?
A. All over the bridge. Sometimes the little fellows would get up there, and I would go and chase them, and tell them,
367 and explain to them how dangerous it was to get around in there, that they might fall down.
Q. I hand you this Defendant's Exhibit D (handing photograph to witness), and ask you to point out what was the greatest height you had ever seen them up on the bridge?
A. Oh, Lord. I have seen them get up there, to the top, very near right up here.
Q. Will you show that to the jury, please?
A. I seen them climb up there and I would be afraid that they would fall down and hurt themselves (indicating it to the jury on the photograph).
Q. Never mind what you are afraid of. Just point it out?
A. They would climb right up along here (indicating).

Q. Have you ever seen them on top of these girders?
A. No, I never saw them up there.
Q. Not that high?
A. No, I never saw them up that high, that I remember.

Mr. Carpenter: Indicating that he had never seen them on the top of the top girders, of the bridge shown in Defendant's Exhibit C.

The Witness: They might have been up there but I don't remember.
Q. I am just asking you what you saw?
A. Yes.

Mr. Curtis: All right. It is on the record.

Q. Now, during your patroling of that yard in 1916, were you on the bridge a good many times, or just a few times?
A. Why, I would see them up there. I would go up and chase them away.
368 Q. Was it a number of times or a few times?
A. A lot of times. So many I couldn't remember.
Q. What was the condition in the summer of 1916, in respect to signs, if you noticed?
A. The signs were there. The signs had been there since I remember, all the signs.
Q. How many?
A. Eight signs. Two on the top and two below, as you walk in, over the entrance.

Mr. Carpenter: That is all.

Cross-examination.

By Mr. Curtis:

Q. You patrolled up there or down in the yard?
A. No, sir, everywheres. I had to keep everything clean around there, in one yard.
Q. That was in No. 1 yard?
A. Yes, sir, in No. 1 yard.
Q. And they had freight cars and so on down there?
A. Yes.
Q. In No. 1 yard, didn't they?
A. Yes, they had freight cars. It runs to a point there.
Q. Your duty as patrolman, is to see that nobody steals anything from the freight cars, isn't it?
A. No.

The Court: We are not on that subject now. The witness has testified as to what he saw the boys doing, what precaution he took and whether he ever notified the company that they were climbing the bridge.

Q. Did you ever notify your superiors that the boys were climbing the bridge?

A. No.
Q. Who knew it?
A. All the bosses knew it.
Q. All the bosses knew it?
369 A. Yes, and they had men there stationed at the bridge, driving the boys away for months at a time.
Q. When was that?
A. Well, I don't know. I knew it for months.
Q. And all the bosses knew the boys were climbing this bridge?
A. Why, sure, they knew.
Q. I do not want the rest of your talk?
A. Now wait a minute.
Q. No, I do not want the rest of your talk?
A. Now, wait a minute.

The Court: Do you want him to name the bosses now?
Mr. Curtis: I am just trying to stop him from going on.
The Court: When a witness is saying nothing that is detrimental to a party, I cannot see why you want to stop him.

Q. And you say some of these boys were little boys?
A. Sometimes, yes, and others, they were big ones.

The Court: One thing I might ask him. (To the witness): What were the ages and sizes of these boys?
The Witness: They ranged from five years to seven and eight years old.
The Court: And you have seen them up on the high part of the bridge?
The Witness: Why, yes, your Honor.
The Court: How high up on the bridge?
The Witness: The little boys would climb, about——
The Court: Did you ever see little boys going up that trellis?
The Witness: I have seen them going up, I guess, about that high (indicating), and I was afraid that they would fall, and if I
370 would be in the yard I would go up there and tell them the danger it was to climb up there.
The Court: Can you make a mark there, how high that was above your head?
The Witness: About two feet, I guess.

Q. Mr. McNally?
A. Yes, sir.
Q. When did you start as a patrolman there?
A. About ten years ago.
Q. And you were a patrolman there in 1914 and 1915?
A. Oh, yes, I have ten years' experience there.
Q. And you saw that same condition, of little boys climbing the bridge in 1914 and 1915?
A. They were warned there by signs as to the danger of it.

Mr. Curtis: I object to that and move to strike it out as not responsive.

The Court: Yes. He asked you whether you had seen them in 1914 or in 1915.

The Witness: Yes, sir, I guess so.

Q. And in 1915?

A. Yes, sir.

Mr. Curtis: That is all.

Mr. Carpenter: That is all.

GEORGE GOETSCH, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Carpenter:

Q. What is your name?

A. George Goetsch.

Q. Mr. Goetsch, were you working for the New York, New Haven & Hartford Railroad Company in 1916?

A. Yes, sir.

371 Q. And are you still working for the New York, New Haven & Hartford Railroad Company?

A. Yes, sir.

Q. In what position?

A. Car inspector.

Q. Where were you working in 1916?

A. At the Oak Point shop.

Q. Where is the shop with reference to the 149th Street bridge?

A. About a block and a half east of it.

Q. And did you have occasion, in going to and from your work, to go over the bridge?

A. Yes, sir.

Q. In 1916?

A. Always.

Q. Do you still do it?

A. Yes, sir.

Q. Were you familiar with the situation on that bridge in the summer of 1916 in respect to signs?

A. Yes, sir.

Q. Tell us what you saw?

A. There was a sign at each corner of the guard rail at the footpath, and four signs up on the stop, two facing the river and two facing the Boulevard.

Q. Have you ever seen any boys playing on the bridge?

A. Yes, sir.

Q. Tell us where?

A. Along the footpath, and along the guard rail. They would look over and down in the yard, and were playing around the guard rail, and at the end stanchion, which was on a slant, they would stand against that and rest there.

Q. Did you ever see them sliding down on that end stanchion?
A. No, sir, just standing up, and maybe sitting down, and sliding down on it but never climbing up.
Q. You never saw them climbing up?
A. No, sir.
372 The Court: How high upon the bridge do you say they were?
The Witness: They stood on it.
The Court: Were they up on any of the beams?
The Witness: No, sir, just along the wharf, and resting up against the stanchion.
The Court: Then they were just about the bridge, but not up in the top of the bridge.
The Witness: No, sir, not up in the bridge.

Q. Where on the footpath were they playing?
A. Along the guard rail.
Q. You mean the guard rail at the side of the bridge?
A. Yes.
Q. What did you see them doing?
A. Playing and looking down on the yard, and throwing stones now and then.
Q. Did you ever have occasion to chase any of them off?
A. Why, we used to chase them, yes.

Mr. Carpenter: That is all.
Mr. Curtis: No questions.

CHARLES LARSEN, called as a witness on behalf of the defendant, being duly sworn testified as follows:

Direct examination.

By Mr. Carpenter:

Q. What is your name?
A. Charles Larsen.
Q. Mr. Larsen, 1916, were you employed by the New York, New Haven & Hartford Railroad Company?
A. Yes, sir.
Q. And you are still so employed?
A. Yes, sir.
373 Q. What was your position in 1916?
A. General car foreman.
Q. In what yard?
A. For the New York Division.
Q. In what yard?
A. Well, I had my office at Oak Point.
Q. Several yards were under your supervision?
A. Yes, sir.
Q. In the Oak Point yard your office was?
A. Yes, sir.

Q. In order to go there, to and from your office, did you have occasion during 1916 to cross the bridge?

A. Yes, sir.

Q. Did you notice at any time during the summer of 1916, the situation with respect to signs?

A. Yes, sir.

Q. When was it? Tell the jury?

Mr. Curtis: That is objected to, the summer of 1916. This accident happened in the first part of June, 1916.

The Court: Objection sustained. I will admit his testimony as to what happened the day after, because that may be an inference, that it was there the day before.

Mr. Carpenter: I do not suppose he could remember that he was there the day after, your Honor.

Q. Did you hear of an accident happening there to a boy in the summer of 1916?

A. Yes, sir.

Q. And his getting burned?

A. Yes, sir, the next morning.

Q. Can you remember the month?

A. No, I do not. In the first part of the summer.

374 Q. What was the nature of the accident, as you heard it?

Mr. Curtis: That I object to.

Mr. Carpenter: I want to see if I can connect it by this witness.

The Court: He said he heard the next morning that there was an accident happened somewhere in the summer of 1916.

Q. Do you know when—did you ever hear of any other accident there to a boy, of a boy being burned?

A. No, sir.

Q. All right. Now tell us what the situation was on that bridge in respect to the signs the day after you heard of this accident?

A. There were signs on the footpath, right underneath the railing, four of them, on the truss span, the span over the railroad yard, what we call No. 1 yard, and four signs, one on each corner, and on the top of the strut that carries the wires other signs, two facing the Boulevard, two facing the East River, one on each corner.

Q. Has that condition remained the same during your knowledge of it in 1916?

A. I have not seen any change in it.

Q. During the time that you had occasion to go back and forth across that bridge to your office, did you ever see any boys playing on the bridge?

A. Yes, sir.

Q. Where?

A. On the top.

Q. On the top?

A. Yes, sir.

Q. How high up?

A. Away up on top of the girders.

Q. Way up on top of the girders?
A. Yes, sir.

Q. Tell us the highest point—I withdraw that—point out
375 on the picture (Defendant's Exhibit A) the highest point you have seen any boy playing there?
A. Up here (indicating).

The Court: Mark it.
(The Witness does so.)
The Court: He has indicated it on this photograph. You can show it to the jury.

(The Witness does so.)

Mr. Curtis: Your Honor, is that a mark that will be distinct from the other marks? There are so many marks on that picture.
The Court: Just write the word "boys" on it.
Mr. Carpenter: I suggest to your Honor also by the way that this witness has used ink, which was never used before on the exhibit.
The Court: Yes.

Q. Have you ever had occasion to chase any of them off?
A. No, sir, I never chased any of them off.
Q. You never chased them at all?
A. No. When I saw them getting up there, I warned them if they were small lads, not to get up there, but I never chased any of them because I was afraid they would fall down.
Q. How many times did you have occasion to warn them?
A. Not so very often. Three or four or six times. I could not be sure.
Q. What did they do when you warned them?
A. They would not get up there as long as I was there, but I would go on my way, and I don't know whether they would go up there afterwards.

Mr. Carpenter: That is all.

376 Cross-examination.

By Mr. Curtis:

Q. You say that there were boys up on the bridge while you were crossing the ridge?
A. Yes, sir.
Q. And did you ever report that to any of your superiors?
A. No, sir.
Q. What was your position at that time?
A. General car foreman.
Q. For the New York, New Haven & Hartford Railroad Company?
A. Yes, sir.
Q. With an office right there at that bridge?
A. Yes, sir.
Q. I just want to ask you one more question?
A. Yes, sir.

Q. About how many men used to use that bridge? By that I mean how many employees of the New York, New Haven & Hartford Railroad Company, in 1915, and before June, 1916?
A. How many what?
Q. How many railroad men used it every day?

The Court: Do you suppose he knows?
Mr. Curtis: Approximately.

The Witness: I can tell you how many men I had, and most of those men used the bridge. We only had twenty-five men at that time there, that used that bridge.
Q. You had twenty-five?
A. I had twenty-five.
Q. And then there were other men around there?
A. Yes, sir.

Mr. Curtis: That is all.

By Mr. Carpenter:

Q. Did all of your men use that bridge in going to and from their work?
A. No, not all of them.
Q. Some of them?
A. Some of them.

Mr. Carpenter: All right.

377 EDWARD MATTSON, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Carpenter:

Q. What is your name?
A. Edward Mattson.
Q. Mr. Mattson, are you employed by the New Haven Railroad?
A. Yes, sir.
Q. And were you in 1916?
A. Yes, sir.
Q. What was your business in 1916?
A. A laborer.
Q. Where were you working?
A. At Oak Point yard, defects.
Q. What is that?
A. That is where they handle the broken down.
Q. What were your duties?
A. I assisted on the cars.
Q. In going to and from that yard, from the place where you lived, did you or didn't you have occasion to use the bridge?
A. Every day.
Q. At 149th Street?

A. Yes, sir.
Q. Did you ever hear of any accident?
A. Just from hearsay, that was all.
Q. On or about when?
A. Around that time of year.
Q. When?
A. Right around when this accident occurred.
Q. What kind of an accident was it you heard took place?
A. A little fellow falling down from the bridge.

Mr. Curtis: I object to that as hearsay.
The Court: Objection sustained.

Q. After you heard——

Mr. Curtis: I move to strike it out.
The Court: Strike it out.

378 Q. After you heard of the accident, did you have occasion to go to the bridge?
A. I passed the factory every day, and I walked the bridge?
Q. Tell us what the situation was after you heard of the accident, the next time you went over the bridge, in respect to signs?
A. I always noted the signs from the first day I passed that bridge.
Q. Signs, I mean, to warn?

Mr. Curtis: I object to that and move to strike it out.
The Court: You can state what was on the signs.

Q. What was on the signs?
A. "Danger. Keep off. Live Wires."
Q. How long have you worked for the New Haven Railroad Company?
A. I have been there four years and four months, and I started to work for them in April of 1916.
Q. How many signs did you see of that nature?
A. Eight signs.
Q. Where were they located?
A. Two at each end and four on each end. Two on each end, and two facing the river and two facing 149th Street, and four on the upper structures, two facing the river and two facing the Southern Boulevard.
Q. Did you ever have occasion to chase any boys off the birdge?
A. No, I never chased anybody off.
Q. Did you ever say anything to anybody—I withdraw that—did you ever see any children playing there?
A. I did.
Q. Tell us what part of the bridge you saw them playing on?
A. A kind of stanchion, right at the base of the bridge and
379 climbing up.
Q. How high did you ever see them climb?
A. Ten or fifteen feet.
Q. Did you ever see them sliding there on the incline?
A. No, sir.

Q. Did you ever say anything to them when you saw them climbing that ten or fifteen feet?
A. No, sir.

Mr. Carpenter: That is all.

Cross-examination.

By Mr. Curtis:

Q. Just one moment, Mr. McNally. I understand that you saw these signs every day?
A. Well, I noticed them. I would not say I took particular notice every day.
Q. You noticed them every day?
A. Not every day. I counted, when I began to work there, I noticed them. I just chanced to notice them passing there.
Q. You had nothing to do with the bridge?
A. No, sir.
Q. Nor with the signs?
A. No, sir.
Q. But almost every day you went by, you just noticed the signs?
A. An occasional glance.
Q. Is that right?
A. An occasional glance.
Q. And you even took an occasional glance at the four signs that you say were upon the top of the structure?
A. I did notice them at times, surely.
Q. You know they were there on June 5th?
A. Yes, sir.
Q. And you say they were there on June 7th?
A. I would not say I seen them on that day. I did not look every day.

Mr. Curtis: That is all.
Mr. Carpenter: That is all.

380 JOHN J. LAWLER, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

Direct examination.

By Mr. Carpenter:

Q. What is your name?
A. John J. Lawler.
Q. Mr. Lawler, in 1916, were you employed by the New Haven Railroad?
A. Yes, sir.
Q. And are you still so employed?
A. Yes, sir.
Q. What was your position in 1916, in the summer?
A. Car inspector.

Q. Where were you working?
A. At the Oak Point yard.
Q. In going to and from your work, in the summer of 1916, did you use this 149th Street bridge?
A. Yes, sir.
Q. Did you hear of this accident?
A. Yes, I heard about it. A night or so after it happened.
Q. You heard of it when?
A. I heard of it the next day or so, I think it was, the day after, I heard something about it.
Q. Did you notice, after the accident, what the situation was in respect to signs?

Mr. Curtis: That is objected to as incompetent, irrelevant and immaterial, and as not within the res gestæ, and as after the accident.

Q. When you first heard of the accident, did you notice about the signs?

The Court: How long after the accident did you notice the signs, after you head heard of the accident, about how long was it, a day or so afterwards?
381 The Witness: No, I think before that.
The Court: Is there any contention that there were not signs there, on top of the bridge?
Mr. Curtis: Yes.
The Court: Would it make much difference whether they were on the top of the bridge?
Mr. Curtis: Considerable, because there were wires under the bridge, and that is what people might think was meant.
The Court: Is there any doubt or any question of doubt, that if this infant had been of such age as to notice and pay any attention to signs, that the signs at the bottom of the bridge would have been ample and sufficient? He would have been a trespasser, but the rule as to trespassers does not apply to children. That has been the practice twenty years. Go on with your examination.

Q. State what the situation was in respect to signs at that time, after the accident. What did you see?
A. I see signs on the bridge there.
Q. How many?
A. Four that I remember.
Q. Four that you remember?
A. It might be more than that, but four.
Q. Where were they located?
A. They were located on the east and west and north and south, at both ends. East and west on one side and north and south on the other.
Q. That is all you ever noticed?
A. Yes, sir.
Q. Had you ever seen any children playing on the bridge?
A. Yes.

Q. What part of the bridge did you see them playing on?
382 A. On both sides of the bridge, where you walk across, the east and west side, where you walk across.
Q. In the roadway?
A. Yes, sir.
Q. Had you ever seen them climing up the bridge?
A. No, I had not.
Q. You never did?
A. No.
Q. Did you ever have occasion to chase any of them back? Did you ever have occasion to chase any of them off?
A. That I did not, but I seen other people chase them off.
Q. I mean did you?
A. No, I never did.

Mr. Carpenter: All right, that is all.
Mr. Curtis: No questions.

JAMES J. BYRNES, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

Direct examination.

By Mr. Carpenter:

Q. What is your name?
A. James J. Byrnes.
Q. Mr. Byrnes, were you employed by the New Haven Railroad in 1916?
A. Yes, sir.
Q. Where were you working?
A. Oak Point motor shop.
Q. Were you working there during the summer?
A. Yes, sir.
Q. In going to and from that shop, did you have occasion to use 149th Street bridge?
A. Yes, sir.
Q. What was the condition there in respect to the signs in that summer?

Mr. Curtis: I object to that, as not within the res gestæ.

383 The Court: About what time did you notice the signs there?
The Witness: At the time of this accident, the morning after, when I heard of the accident, I noticed boys would be walking along, and would begin to climb up on top of the lattice work, and I knew they were going to get burned, and I looked up there to see, and the signs were always in place.
Q. Did you ever have occasion to warn any of them away?
A. Just hollered at them from the yard.
Q. What would they do?
A. Why, they would not bother with you. Quite often, to tell you the truth, they used profane language.

Q. What is that?

The Court: Did you ever tell any of your superiors about the frequency of these boys there, climbing up that trellis, and your telling them to stay off the bridge?

The Witness: Why, yes, sir, my own foreman used to chase them.

The Court: Your foreman?

The Witness: Yes, sir.

The Court: Very well.

Q. Indicate the highest part on this picture, which you have seen the boys up on?

A. These boys were playing in and around this lattice work, and up on top of the structure, even here, (indicating), running around over there, playing tag, and sliding around on this side (indicating).

Mr. Curtis: May he mark that, your Honor?

The Court: Yes.

(Witness indicates the highest point with a "Z," where the boys climbed.)

384 Q. Do these marks refer to the lattice work which is right in the back here?

Mr. Curtis: I object.

Q. All right. Tell us what you mean by lattice work?

A. This here lattice work in here, on this bridge here, these boys would climb across that end, and over on the other part, on the bottom, on part of this girder here or beam, whatever it may be, and then they would get over here on top of this section, and on top of this section. They would keep running around like that, maybe for an hour, but if nobody hollered out, they would stay there all day. Quite often I got them up there on the top when I was going home from work.

Mr. Carpenter: That is all.

Cross examination.

By Mr. Curtis:

Q. Just one question, Mr. Byrnes?

A. Yes, sir.

Q. You said to the jury, you said they ran on this section and this section?

A. Yes, sir.

Q. Of course, that does not mean anything on the picture. Will you make two more Z's where you mean the two different sections?

A. Yes, sir.

(Witness so marks photograph.)

The Witness: Do you want me to make it over here?

Q. You said this section and this section?
A. I said this section and this section, and this section over here, on the lattice work (indicating) and right in here, I cannot mark it in the place, but it is right in here (indicating).

Mr. Curtis: All right. That is all, Mr. Byrnes.

385 By Mr. Carpenter:

Q. Just let me see that key that you put there.

(Witness shows mark to Defendant's Counsel.)

Q. Indicating the top part of the girder?
A. Yes, sir.
Q. That was the highest point you saw them?
A. Yes, sir.
Q. On the top of the top girder?
A. Yes, sir.

Mr. Carpenter: That is all.
Mr. Curtis: That is all.

GEORGE E. STRINGER, called as a witness in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Carpenter:

Q. What is your name?
A. George E. Stringer.
Q. Mr. Stringer, in 1916, in the summer, were you employed by the Edison Company?
A. No.
Q. Who were you working for?
A. The New York Central Railroad.
Q. Where — you working?
A. At the power station, 149th Street and East River.
Q. That is between the bridge at 149th Street and the water?
A. Yes.
Q. And in going to and from your place of business, did you cross the bridge?
A. I did.
Q. At 149th Street?
A. I did.
Q. Did you hear about this accident?
A. No.
Q. You were working there how long prior to the summer of 1916?

A. Well, from February 28, 1912
386 Q. Using that bridge every day?
A. Every day, twice a day.

Q. Now, during that time, from 1912 down to 1916, can you tell us what the situation was with respect to signs?

A. What is that question again?

Q. Now, during that time, from 1912, down to 1916, can you tell us what the situation was with respect to signs?

A. Why, I have noticed signs, I can remember, back six years, signs on that bridge.

Q. Six years from today?

A. Yes, sir.

Q. Six years back from today?

A. Yes, sir.

Q. And can you recall how many there were there?

A. Why, there was about—I can recall, I can remember six signs on the bridge.

Q. Where were they located?

A. Why, on the top of the girders, on the north side, like, and on the south, and on the walkways, where you walk along. There was one on the railing on each side.

Mr. Carpenter: That is all.

Mr. Curtis: No questions.

THEODORE C. FRESENIUS, called as a witness in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Carpenter:

Q. What is your name?

A. Theodore C. Fresenius.

Q. Mr. Fresenius, who were you working for in 1916, in the summer?

A. The New York Central power house.

387 Q. This same power house that Mr. Stringer referred to?

A. Yes, sir.

Q. Now, in order to get to—I withdraw that—how long did you work at that power house?

A. Since March 26, 1916.

Q. Since March 26, 1916?

A. Yes, sir.

Q. Do you still work there?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. During the year 1916, from then on, from then on down, will you state what the situation was on that bridge with respect to signs?

A. Yes, sir, there were eight signs, four on the footpath, on the guard rails and four on the superstructure.

Mr. Carpenter: That is all.

Cross examination.

By Mr. Curtis:

Q. You had nothing to do with this bridge or with these signs, had you?
A. Sir?
Q. You had nothing to do with this bridge or with these signs?
A. Nothing to do with the bridge or with the signs?
Q. Yes.
A. I could not help but see them, sir.
Q. I did not ask you that. Who told you that you could not help but see them? You are a bright and intelligent man. I did not ask you that. I asked you did you have anything to do with the bridge or the signs?
A. I walked over there.
Q. Have you any connection with the bridge?
A. I always walked over there.
Q. The same as any citizen?
A. Yes, sir.
Q. But you had nothing to do with the control or the repairs?
A. No, sir.
Q. And you are not employed on the bridge?
A. No, sir.
388 Q. You had nothing to do with the signs?
A. No, sir.
Q. You had nothing to do with the signs in putting them there or in keeping them there?
A. No, sir.

Mr. Curtis: That is all.
Mr. Carpenter: That is all.

The Court: You say you walked over there?
The Witness: Yes, sir.
The Court: Did the public generally use that bridge as a roadway?
The Witness: The men in the power house always used that bridge, until 1919, when the Interborough forbade it.
The Court: Up to 1916 there was no inhibition, or any policy or rule adopted to prevent the public from going over that bridge?
The Witness: No, sir.

The Court: That is all.

JOSEPH C. HILDRIDGE, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Carpenter:

Q. What is your name?
A. Joseph C. Hildridge.

Q. Mr. Hildridge, you are employed by the New York, New Haven & Hartford Railroad Company?
A. I am.
Q. How long have you been so employed?
A. Five years.
Q. How many years?
A. Five and a half years.
389 Q. So you were working for them in June, 1916?
A. I was.
Q. Did you hear about this accident to this boy?
A. I did, yes, sir.
Q. Were you assigned to investigate the case?
A. Yes, I was.
Q. Did you talk with this boy while he was in the hospital?
A. I did, yes, sir.
Q. And do you recall the date?
A. June 28th.
Q. Did you ask him then about this accident?
A. I did.
Q. How did you go about it?
A. I had a court stenographer with me, and he took down my questions and took down the answers.
Q. You asked questions and he answered?
A. Yes, sir.

Mr. Curtis: If the Court please, I object to Mr. Carpenter repeating every answer the witness makes.
The Court: That is the introductory.
Mr. Curtis: I object to him repeating every answer that the witness makes. It is contrary to the rule.
The Court: Counsel repeats it?
Mr. Curtis: Yes.
The Court: I know it consumes useless time, but I do not know that it is so very reprehensive.

Q. Did you ask him whether he could read or not?
A. Yes, sir.
Q. What did he say?
A. He told me that he could, and he told me what the signs read.
Q. What did he say about the signs?
A. He said there was a sign on top of the bridge, about fifteen feet from where he was injured, reading, "Live Wires. Danger. Keep Off."
390 Q. Do you remember asking him this question: "Q. Did you know that you had no right?" and do you remember his making this answer, "A. No." And then do you remember asking this question: "Q. You knew that you should not go up there?" and do you remember his answering, "A. Yes, sir."
Q. Do you remember that?
A. I do, yes, sir.
Q. Do you remember this taking place—"Were you afraid when you went up there that the men would catch you? A. No, there was

no man near me. Q. How do you know there was no man near you? A. I saw. Q. You looked? A. Yes."

Mr. Curtis: I object to this. He must ask him the direct questions, and not question and answer. The rule is, did he say so and so, yes or no, did he make such and such a statement, yes or no.

Mr. Carpenter: I have a right to ask him these questions.

The Court: I do not quite get the point.

Mr. Curtis: I say that I object. That the rule is, in this State, to ask him, did he say so and so, and this witness must answer yes or no.

The Court: They may look upon it with the seriousness and solemnity of a deposition, but nobody else would.

Mr. Curtis: That is just why I object to it. That is just what he is trying to do now.

Mr. Carpenter: I object to that statement.

Mr. Curtis: I repeat it.

The Court: If counsel wants to use it let him go ahead.

391 Mr. Curtis: I do not object to him using it.

The Court: Just ask the witness what the interview was.

Mr. Carpenter: Do you mean he should state what the entire interview was?

The Court: No, not the particular subject.

Q. And did this take place? "Q. And when you saw there was no man there, what did you do? A. Went up."

Mr. Curtis: I object. Nobody knows better than Mr. Carpenter, that he must follow the rule of our practice.

The Court: What does it amount to in a case of this kind. I don't know what the courts of this State hold, but if they hold that that was binding on the plaintiff, an inference, under the circumstances, it would not bind me. I do not care what the authority was in the State of New York.

Q. Did that take place?

A. It did.

Mr. Carpenter: Before putting this next question, I think I must except to your Honor's statement as just made, on the ground that it is unfair.

The Court: Very well.

Q. "Q. And then when you saw there was no man there, what did you do? A. Went up. Q. You went up? A. Yes, sir, there was a man working far away." Did that take place?

A. It did.

Q. Did he make any statement or say anything at all that he did not understand the questions?

A. No, sir.

392 The Court: Now you are asking him for a conclusion.

Mr. Carpenter: No, I am asking him whether he made any statement to him that he did not understand his question.

Mr. Curtis: I object to it as incompetent, irrelevant and immaterial.

The Court: Yes, it is intensely leading, but go on.

Mr. Carpenter: Again I must except, your Honor.

The Court: Very well.

Q. Who was there besides you and the stenographer?

A. Dr. Flynn.

Q. Is Dr. Flynn a physician there in the hospital?

A. Why, he has various cases there in the hospital that he takes care of, yes, sir.

Q. Do you know whether he was doing any work on this boy?

A. Why, he examined the boy when he was brought in there.

Q. Where was the boy when this conversation took place?

A. Lying in bed in the ward.

Q. Public or private?

A. Public.

Mr. Curtis: That is objected to as incompetent, irrelevant and immaterial.

Mr. Carpenter: Wherever it was, if it was a probability, sir, I think it is competent.

The Court: What difference does it make?

Mr. Carpenter: I want to show this railroad treated the boy in a proper manner, and did not deal unfairly with him.

Mr. Curtis: Did the boy have anybody there with him, his parents or anbody?

393 The Court: You can ask him that.

Mr. Curtis: I am going to ask him, if I get a chance at him.

Mr. Carpenter: You can ask him now.

Cross-examination.

By Mr. Curtis:

Q. Your business is an investigator of claims against the railroad company?

A. My business is the investigating of accidents occurring on the railroad property.

Q. All right. And in the course of that investigation, you do see different witnesses, don't you?

A. I do.

Q. And you are always trying to get a statement from the plaintiff, aren't you?

A. In the majority of cases, yes, sir.

Q. You always try to get it, whether you get it or not?

A. No, I do not.

Q. You say yes, in the majority of cases, is that right?

A. Yes.

Q. And you always try to get a statement that is favorable to the railroad company, don't you?

A. No, sir, I try to get a statement of the facts of the accident. I do not care who they are favorable to.

Q. You do not care whether they are favorable to your employer or not?

A. No, sir, as long as I know the facts, I do not care who they favor.

Q. How long have you been working for that company?

A. Five and a half years.

Q. Do you know how old this boy was?

A. Yes, sir, I asked him how old he was.

Q. All I want to know from your knowledge, is direct answers, Mr. Hildridge?

A. Yes, sir.

Q. And nothing else?

A. All right, sir.

394 Q. You knew this boy was seven years old, didn't you?

Mr. Carpenter: I object to that.

The Court: Allowed.

Mr. Carpenter: Exception.

A. He told me has was seven and a half.

Q. When you went to this hospital, did you have his mother with you?

A. No, sir.

Q. Did you have the consent of his mother to go to him?

A. No.

Q. Did you have his father with you?

A. No.

Q. Did you have the consent of his father to go there?

A. No.

Q. Dr. Flynn has examined cases for the New York, New Haven & Hartford Railroad Company in the past, hasn't he?

A. Yes.

Q. And he has testified in court for them, in cases which they brought, hasn't he?

A. I don't know.

Q. You do not know it?

A. No, he never testified on any case that I testified on. I have never seen Dr. Flynn in court.

Q. Do you know whether he has examined cases for them, and on their behalf?

A. He has examined cases for me.

Q. And he was there on this occasion when this little boy was lying on his cot?

A. He was at the hospital when I arrived there.

Q. He was there when this little boy lay in his cot, wasn't he? Was he there or wasn't he?

A. When I took the statement?

Q. Yes?

A. Yes, sir.

Q. Can't you tell this jury whether or not at the time this boy had just been operated on, a matter of a few days, he was there?

A. I don't know.

395 Q. You didn't even know whether before his arm was gone, he was there, did you?

A. No, sir, I did not.

Q. You say you were there the 28th of June, don't you?

A. Yes, sir.

Q. His first operation was the 25th, wasn't it? Do you know that?

A. No.

Q. The boy was not in pain, was he?

A. He did not complain any.

Q. He seemed to be normal and comfortable and pleasant?

A. Yes, sir.

Q. He did not even seem to be—although in a comfortable position, you did not even notice that perhaps he might be under the influence of some drug, or of some opiate, did you?

A. Why, he answered my questions.

Q. Did he, yes or no?

A. No.

Q. Has it been your habit to take statements from children of seven or eight years of age, without any of their natural guardians or their attorneys being present? Is that your habit?

A. When the occasion demands it, yes, sir.

Q. That occasion would be the desirability, as looked at by the New York, New Haven & Hartford Railroad Company, and its claim department, wouldn't it?

A. No, sir, not at all. That would be when I was not able to get——

Q. You have answered. I do not want any remarks from you. Do not argue with me.

A. I am not arguing with you.

The Court: I think you invited these remarks.

Mr. Curtis: All right.

The Court: We want the facts from this man about the practice of the company. Why not ask him the direct questions?

396 He seems to be an intelligent witness.

Mr. Curtis: All right. That is all.

Redirect examination.

By Mr. Carpenter:

Q. That is all. Oh, one question. Did you go up to Dr. Flynn's house yesterday to get him?

A. I communicated with him by 'phone. That is, with his office.

Q. Is he in the city or not?

A. No, sir, he is out of the city with his two sons.

Mr. Carpenter: That is all.

Recross-examination.

By Mr. Curtis:

Q. When did he leave the city?
A. I don't know.
Q. Couldn't you find that out?
A. No, sir.
Q. Will you sit down please, just a moment?
A. Certainly.
Q. Couldn't you find that out?
A. No, sir, I did not ask.
Q. Didn't you know this case was on this calendar for trial a week ago last Monday in this court?
A. No, sir, I did not know it.
Q. You never heard that?
A. Yes, I did. I will take that back. I was on my vacation, and they called me up on the long distance telephone and told me about it.
Q. When did they call you up on the long distance telephone?
A. On August 7th.

The Court: Why is that important?
Mr. Curtis: With the importance of this case, if they thought he would stand for it, they could get him here.
397 The Court: If they wanted him they could get him here.
Mr. Curtis: I have no more to say, sir. Your Honor is right. That is all.
Mr. Carpenter: That is all.

FRED B. MULCOX, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Carpenter:

Q. What is your name?
A. Fred B. Mulcox.
Q. Mr. Mulcox, in June of 1916 what was your position?
A. Stenographer.
Q. At that time were you working privately, or were you connected with some court?
A. In business for myself.
Q. Do you remember on June 28, 1916, being at the Lincoln Hospital?
A. I do.
Q. With the witness on the stand just ahead of you?
A. Yes, sir.
Q. Did you take a statement from a boy who was hurt there?
A. Yes, sir.

Q. Just how is that done?
A. Questions asked by Mr. Hildridge, and reported by me.
Q. And what?
A. And reported by me.
Q. Mr. Hildridge asked questions that the boy answered?
A. Yes, sir.
Q. And they were taken down by you in short hand?
A. Yes, sir.
Q. Are you still working for yourself as a stenographer?

398 Mr. Curtis: I object to that as incompetent and irrelevant and immaterial, whether he is or not.

The Court: It is introductory, merely to find out the man's occupation. It is competent to inquire into, but it is not very material. It is introductory. Objection overruled.

Mr. Curtis: Exception.

Q. For whom are you working now? What is your position now?
A. I was appointed by Judge Smith of the Appellate Division as confidential clerk and stenographer, in October of 1918, and hold that position today.
Q. Which Judge Smith is that?

Mr. Curtis: That is objected to as incompetent, irrelevant and immaterial.

The Court: That is not material.

Q. On which Bench is he?

Mr. Curtis: That is objected to.

Mr. Carpenter: I withdraw it.

The Court: I suppose Judge Smith would have a competent stenographer, if he could get one. What has that to do with the merits of this case.

Mr. Carpenter: Simply to show the nature of the man's work, and the type of man he is.

The Court: Nobody questions that. I have not heard any questions as to whether he is or not. I do not think there is any question but what he took down the answers and took down the interview properly and honestly.

399 Q. I hand you this document, Mr. Mulcox (handing statement to the witness) and ask you if that is the typewritten statement and also your notes?
A. Yes, sir.
Q. That you took that day?
A. Yes, sir.

Mr. Carpenter: I offer it in evidence.

Mr. Curtis: I object to it as entirely improper.

The Court: Objection sustained.

Mr. Carpenter: Exception. May I have it marked for identification?

The Court: Yes.

Statement marked Defendant's Exhibit D for identification.

Mr. Carpenter: I ask your Honor to take judicial notice and charge the jury that the Appellate Division of the Supreme Court of New York is the next highest court to the Court of Appeals.

The Court: Yes, but they do not prescribe rules of procedure for Federal Courts.

Mr. Carpenter: No, but I merely ask your Honor to take judicial notice of that position.

The Court: This is not a document or evidence that was produced in court, and therefore it is purely ex parte, to read the answers given there.

Mr. Carpenter: Exception. That is all.

Cross-examination.

By Mr. Curtis:

Q. Mr. Mulcox, in 1916, at the time that you went to this hospital, where was your office?

A. 150 Nassau Street.

400 Q. You were and had been for some time a stenographer?

A. Yes, sir.

Q. Had you ever done any work before that for the New York, New Haven & Hartford Railroad Company of any kind?

A. I do not think so, not before that day.

Q. Do you know of any reason why they came to you particularly at that time?

A. No, sir.

Q. You never had done any work for them?

A. I do not think so.

Q. Now, think it over?

A. I think I did, afterwards, but I do not think I did before.

Q. Do you know any reason why, on earth—I withdraw that for the moment—About how many fast or acknowledged stenographers, competent stenographers, would you say there are in New York City.

Mr. Carpenter: I object to that.

The Court: Objection sustained.

Q. Can you think of any reason why this company, which you never had anything to do with before, picked you out from the hundreds of stenographers in New York City, to go on this expedition?

A. I suppose they wanted a stenographer, and were unable to get one.

Q. There are many hundreds in this city?

A. Stenographers?

Q. Yes.

A. I dare say.

Q. How many hundred stenographers are there in this city?

Mr. Carpenter: I think this is argumentative and immaterial.

The Court: Objection sustained, unless you can impeach this

witness on cross-examination, by showing that he has made
401 fraudulent reports in such cases, I do not thing this cross-examination is pertinent.

Mr. Curtis: I am trying to find out how the New York, New Haven & Hartford Railroad Company came to get him on this little expedition.

The Court: Did you advertise all around New York as a public stenographer?

The Witness: I did. My name was in the telephone book.

Q. Are you prepared to say, that so far as you know, you never before this time ever did any work directly or indirectly for the New York, New Haven & Hartford Railroad Company, or for its attorneys, or for any of its claim agents, so far as you know?

A. I do not think before that date I ever did.

Mr. Curtis: That is all.

Mr. Carpenter: That is all.

HOGE GILLIAM, re-called:

By Mr. Carpenter:

Q. Mr. Gilliam, how long have you been an electrical engineer?

A. Since 1900. Twenty years.

Q. Will you state your experience and education and qualifications?

A. I had the regular preliminary high school education, and attended the University of Virginia, the Richmond Polytechnic, and I was conected with the Richmond Electric Company. I went with the Westinghouse Company in 1897. I was in charge of construction work, as erecting engineer, erecting the electrical ma-
402 chinery, in plants throughout the United States, and in Canada and Mexico. I was assigned as District Engineer of Philadelphia in 1902. From Philadelphia I was assigned as District Engineer of the Westinghouse Company in St. Louis, having charge of the construction of the preliminary work in connection with the St. Louis Exposition. From there I came to the——

The Court: The Court holds that you are competent, without any further details. Go on and ask the question. I hold he is an expert on that line, without any further questions.

Q. How long have you been working in and dealing with high tension propulsion electricity for transportation purposes?

A. Since 1905.

Q. How long have you been employed by the New York, New Haven & Hartford Railroad Company?

A. Since 1907.

Q. Did you do any work on the designing and constructing of this electrification system of the New York, New Haven & Hartford Railroad Company?

A. I did.

Q. At the time you did that, were you consulted as an outside engineer, or were you regularly employed by them?

A. I was employed by the Westinghouse Electric & Manufacturing Company, who had contracts to instal this system.

Q. Do you recall when that electrification of the New York, New Haven & Hartford Railroad was put through? The year?

A. Which one do you refer to?

Q. The main line?

A. The main line was electrified in 1907. That is, it was energized in 1907.

Q. When was the Harlem River & Portchester Branch, which runs under this 149th Street Bridge electrified?

A. In 1912.

403 Q. Since the installation of the electrical system of the New York, New Haven & Hartford Railroad and its branches, what has been the voltage of the current used?

A. Approximately 11,000 volts.

Q. And was that the voltage of the current which was carried over this bridge at 149th Street?

A. That was approximately the voltage, yes.

Q. From your experience—I withdraw that—what kind of a current does the New York, New Haven & Hartford use on its main and branch lines?

A. That is what is known as an alternating current.

Q. What does that mean?

A. It means that the current, instead of flowing in a direction which is from one polarity to the other, that it reverses itself backwards and forwards.

Q. Do you know of any other railroad system in the country which employs the same type of electricity, and the same method of electrical propulsion?

A. I do.

Mr. Curtis: We object to that as incompetent, irrelevant and immaterial.

The Court: I do not know what the purpose of this examination is, unless it is to show that these wires, that were arranged and were in use by the company on this bridge, or over this bridge, were so arranged, and so safeguarded as is usual with railroad companies or other companies using wires in that way. If that is the purpose of it, why, then it is competent.

Mr. Curtis: That is not the question.

The Court: He is trying to show that the wires, as they
404 were there, at the time, I presume—that is the purpose of it, that such wires are used by other companies in that connection, used on similar construction.

Objection overruled.

Q. You may answer.

A. I do.

Q. State, will you please?

Mr. Curtis: Exception.

The Witness: The Pennsylvania Railroad, on their Philadelphia Branch. What is known as the electrical branch at Philadelphia.

The Court: We are speaking with regard to bridge structures. We do not care anything about how other places were operated. That is not the question here, but it is the use of wires over bridges.

The Witness: I can answer you yes, just the same.

The Court: All right.

The Witness: That is, as far as the physical conditions will permit. There are no identical bridges. They are not exactly alike, but the general scheme.

The Court: In the use of free electricity, in carrying wires stretched across the bridges?

The Witness: Yes, sir.

Q. You were starting to say what other railroads?

A. Yes, sir.

Q. Continue.

A. The Pennsylvania, on their Paoli Branch. The Norfolk & Western. The Boston & Maine, and a certain section on the Erie.

Q. Does any part of the Long Island use that same system?

A. No, not the same as the New Haven.

405 Q. How does the New Haven—you are familiar, of course, Mr. Gilliam, with the New Haven, and you are familiar with the 149th Street Bridge?

A. I am.

Q. What is the practice which the New Haven has adopted in respect to carrying wires over bridges of that type?

Mr. Curtis: To that we object. We are not bound by the practice that they have adopted.

The Court: They are not required to use any greater precautions than those ordinarily in use.

Mr. Curtis: I will argue that, sir. I object to the particular method that the New York, New Haven & Hartford Railroad Company has adopted. That is all I have said.

The Court: I presume he expects to follow that up, by saying that that is the one adopted, and that is the standard, and as to whether it is negligence or not, so far as it may be of any use in this case.

Mr. Carpenter: Your Honor says he may answer?

The Court: Go on and answer.

The Witness: The wires that are carried over this bridge are supported by porcelain insulators, which in turn are fastened to cross arms, which in turn are fastened to an upright steel structure, known as a bonnet, which in turn is lifted to the top girders of the bridge.

Q. Can you state how that system compares, and how that practice compares with the practice on these other railroads to

406 which you have referred, in practically similar circumstances?

A. It is similar, as far as the physical conditions permit it

to be similar. In other words, it is a general scheme, of carrying transmission wires at a clearance over bridges.

Mr. Curtis: I object and move to strike it out. This plaintiff is not bound by any of this witness's conclusions, as to whether the conditions were similar, or whether the physical conditions permit them to be similar. That is the witness's conclusion, which we are not bound by. They must be absolutely similar, or it is a conclusion of his.

The Court: Objection overruled.

Mr. Curtis: Exception.

Q. You heard the Columbia college professor testify? Were you here in court when he testified?

A. I heard an electrical expert testify, yes.

Q. Did you hear him describe what in his opinion would make a situation such as is involved at the 149th Street bridge, safe with respect to wires, by building a steel screen, projecting out about three feet on either side of the strut, which support the wires, which was so devised and erected, that it could be put up and taken down by the men who came there to do repair work on the wires? Did you hear him so testify?

A. I did.

Q. I ask you, from your experience, whether you consider that that is a reasonably safe and practical method of protecting wires in that situation, where they are used for transportation, and for propulsion services as this was?

A. I do not.

Q. Do you know of any railroad in the country which has
407 adopted that practice described by him, or that method as described by that expert?

A. I do not.

Q. Did you ever hear of it?

A. No.

Q. Now, will you state, as an expert I believe you have stated that it is not practical?

A. Yes.

Mr. Curtis: He has been all over this once, and I object to repetition.

Q. Will you state your reasons now, as an expert, why you consider it would not be practicable and reasonable?

Mr. Curtis: We object. He has made this statement, and if any reasons are required that is a question for cross-examination. It is not for the examination in chief, and I object to his reasons.

The Court: He is in conflict with the other witness on that point.

Mr. Curtis: That is all right. That is for the jury.

The Court: No, I do not think so. He has qualified as an expert, and you have put your hypothetical question to him, and he has told you what his opinion is. As to argument, that is for you, and you can make your argument to the jury.

Mr. Carpenter: All right, your Honor. I withdraw it. I didn't know whether your Honor and the jury would like to know his reason for it.

The Court: No.

Mr. Carpenter: All right.

Q. How many bridges and struts—I withdraw that—what is a strut, what is known as a steel strut, on the New Haven system?

A. A strut, in the general understanding, is known as an up-
408 right column, to which wires are fastened, supported on cross arms or porcelain insulators. It is a support to carry a wire on an overhead structure.

Q. And those are the structures which are used over the New Haven Road, on its main and other lines, are they not for carrying their wires overhead on its main and other lines?

A. Yes.

Q. Are those made of steel?

A. They are.

Q. Are they made of trellis work?

A. Some of them.

Q. Do your men, in making examinations and repairs, use the trellis work to climb up?

A. They do.

The Court: I think the testimony in this case shows the boys did.

Mr. Curtis: There is no objection to this question. I objected to his theory. The facts I did not object to.

Q. How many struts are there on this bridge, and of a nature similar to the one at 149th Street, how many struts are there on bridges on the New Road, similar to the one you have described, to the best of your recollection?

A. Upward of 2,000.

Q. What is the length of the electrified line of the New York, New Haven & Hartford Railroad Company?

Mr. Curtis: That is objected to.

Q. Between the two terminals?

The Court: What is the purpose of this?

Mr. Carpenter: Why, to show that the method which their so-called expert testified to, is utterly impracticable.

409 Mr. Curtis: On account of the expense.

The Court: About this wire mesh?

Mr. Carpenter: Yes.

The Court: He said it was not practicable to do it that way. What more do you want. He is an expert, and there is a conflict between the two.

Mr. Carpenter: I submit that we ought to have before us, in weighing the credibility of his opinion, the physical situation on which it is based.

The Court: Where?

Mr. Carpenter: Along the line.

The Court: From here to Hartford or Boston?

Mr. Carpenter: Yes.

The Court: You might as well go into the cost of excavating over here at Westchester, on that line. It is just about as material. We are talking about the bridge. The only thing the Court and the Jury are concerned about is the construction of this bridge, and the wires over that bridge, and whether they were up to the standard and whether they are safe or not, and whether it was practicable.

Mr. Carpenter: In the Supreme Court case, in the Stout case, the Court laid down the proposition that it was material.

The Court: Yes, I know. I read it. I read an opinion where the courts all go into it, and even comment upon the fact, and go into the cost of the land, and how much money was paid for the land, and even the cost of each telephone pole, and all such
410 things, as if that had anything to do with whether or not there was carelessness.

Mr. Carpenter: Has your Honor seen that Supreme Court decision?

The Court: Of this State?

Mr. Carpenter: No, the United States. The Stout case.

The Court: Produce it. Your construction of it may be different from mine.

Mr. Carpenter: May we send for it?

The Court: Go on with your questions.

Mr. Carpenter: Very well.

Q. Can you state from your experience and knowledge of steel values and labor costs, whether from the standpoint of cost alone, it would be practicable for this railroad to use the device which the plaintiff's expert described?

Mr. Curtis: That is objected to as incompetent, irrelevant and immaterial, and furthermore, that no question of safety is measured by dollars, and that furthermore——

The Court: I will overrule your objection.

Mr. Curtis: And further the Supreme Court does not agree with Mr. Carpenter, in spite of the assertion of counsel.

The Court: Objection overruled. If this witness can testify that it was impracticable to do that, because it would bankrupt the company, why then, he may draw his conclusion, and say so, but that is his opinion, and the jury is not bound by it. The jury can accept it, but they have opinions of their own, and are entitled to
411 exercise their own common sense and judgment. These questions are not absolutely binding on anybody. It is merely for light and explanation, which experts are always called for in court. You argue over something just as if it was a decree from Washington, from the Supreme Court, and an opinion written by the Chief Justice.

Q. His Honor says you may answer it.

The Court: I am surprised that juries are kept here to listen to these immaterial matters in question, and the courts ought to take it in hand.

Mr. Carpenter: May I except to your Honor's remark as to its being immaterial?

The Court: Yes. The jury, of course, is not taking this as applicable to this case, but generally, the conditions that exist, is what I am commenting on, and I have had some little experience, thirteen years, and from New York to the West, and from the Atlantic to the Pacific, and it has been my experience, in many courts, and I must say that the practice and the proceedings which exist in the courts of this State, are not calculated to subserve the interest of the public, or to result in justice, if this is a fair sample of it. Go on.

Mr. Carpenter: Again, your Honor, on behalf of my client, I except to your Honor's comment about the practice.

The Court: Yes.

Mr. Carpenter: I contend that it is prejudicial to my cli-
412 ent's case and ask for a withdrawal.

The Court: Prejudicial to what?

Mr. Carpenter: To my client's case.

The Court: The public practice, general procedure generally, I am commenting on. That does not affect your client.

Mr. Carpenter: I take it it was my practice in asking these questions which called for these comments.

The Court: The practice of both sides, I say, does not tend to conserve time, when you examine for hours on collateral things.

Mr. Carpenter: Again I except to your Honor's remarks.

The Court: Do, and put it down there, and proceed with your witness.

Mr. Carpenter: And I except to your Honor's denial of the motion.

The Court: Very well.

Q. Can you state, from your experience and knowledge of steel values, and of labor costs, whether from the standpoint of cost alone, it would be practicable for this railroad to use a device which the plaintiff's expert described?

A. I would state that it would be impracticable.

Q. Now, can you tell from the standpoint of function, bearing in mind the function which these wires perform, whether it was practicable to have such a device?

Mr. Curtis: I object to that.

The Court: I exclude that question.

Mr. Carpenter: May I have an exception?

The Court: Yes.

413 Q. Do your men have to go to these wires to repair them at times?

A. They do.

Q. Are they at times torn down as the result of electrical storms?

A. Yes, sir.

Q. Was it only last week that the whole system was tied up as a result of a storm?

Mr. Curtis: I object.

The Court: Objection sustained. This is all a matter of common knowledge. I do not suppose there is a man on that jury who does not know it.

Mr. Carpenter: Exception. I respectfully ask to have this question answered, in view of the information which has come from this witness.

The Court: The same question which I have ruled out?

Mr. Carpenter: Yes, sir.

The Court: Well, I won't entertain it.

Mr. Carpenter: May I have an exception?

The Court: Yes.

Mr. Carpenter: Exception. I think that is all.

Cross-examination.

By Mr. Curtis:

Q. Now, Mr. Gilliam, about how long in all have you been in the employ of this particular defendant, the New York, New Haven & Hartford Railroad Company?

A. Since 1907.

Q. And just what is your position with them?

A. My present position, the position I hold now is superintendent of electric transmission.

Q. And under that department would come the transmission of this current through the wires over this particular bridge?

A. It would.

414 Q. I want to ask you this. Do you know about how wide it is from one of those arms—what do you call them—struts—that hold up the wires?

A. They hold the main line wires.

Q. Over this bridge particularly, those arms?

A. Show me on the picture.

(Picture shown to witness.)

Q. These things that hold the wires (indicating)?

A. They are cross arms.

Q. Cross arms are what you call them?

A. Yes, sir.

Q. And on the cross arms are placed these porcelain insulators?

A. Yes, sir.

Q. On this particular bridge, Mr. Gilliam, from one cross arm on the one side of the bridge to the other cross arm, on the other side of the bridge, is about how far? I might say this much, that the engineer yesterday testified that the entire bridge was 54 feet wide?

A. That is approximately the distance.

Q. All right. The wires at that time and at this time are suspended from one of these cross arms?

A. Yes.

Q. So far as the space between the two cross arms is concerned, there is no other support?

A. No.

Q. From your observation of these wires, how much sag, if any, would there be in the middle of the wire?

A. About four inches.

Q. From a physical standpoint only, not from what you might call an engineering or a practical demonstration, but from the physical standpoint only, and by that I mean, the fact that it could be done, not that it should be, understand, but that it could be, could you stretch a wooden conduit or box with three sides, by
415 attaching either end to the upright—what do you call those?

A. The bonnet.

Mr. Carpenter: Just a minute, please.

Q. You could stretch a wooden conduit, a wooden construction, having a bottom and two sides to it, by attaching such construction at each end to the bonnet, and at intervals say of 8 or 10 feet, below the uprights, from the top girders of the bridge, to support that wooden structure, could you not?

Mr. Carpenter: I object to the question as incompetent and immaterial, and especially upon the ground that he does not make any suggestion as to how it could be done.

The Court: Objection overruled. I understand the purpose of it. This witness was asked whether it was practical or not, and this cross-examination tends to show whether it is or isn't.

Mr. Carpenter: Exception: I object to the particular question on the ground that it is merely assuming that it could be done.

The Court: Objection overruled.

Mr. Carpenter: Exception. I object to it on the further ground that his own expert when on the stand, never suggested any such device, and they are bound by him, on their theory of the case.

The Court: Objection overruled. I am not going to consume more time. This case ought to close.

Mr. Carpenter: Exception.

416 Q. Do you know the question?

A. I know the question, but I want to ask you this, for what purpose?

Q. Never mind the purpose. I will come to that later on. Could that be done?

Mr. Carpenter: Was that physically——

The Court: Will you permit counsel to cross-examine, or are you going to inject yourself into the cross-examination?

Mr. Carpenter: I wanted to know myself whether that is what he meant, so that I may understand fully the import of his question.

The Court: You can change the question to suit yourself, as is your practice up here.

Mr. Carpenter: Not at all. It was in the nature of an inquiry, to find out what he meant.

The Court: You have the right, on the re-direct, to explain anything, without taking the witness from the cross examiner, and injecting questions into it yourself.

Q. Do you know the question?

A. I would like to have it read.

Q. You could stretch a wooden construction, having a bottom and two sides to it, by attaching such construction at each end, to the bonnet, and at intervals of say 8 or 10 feet, below the uprights, from the top girders of the bridge, to support that wooden structure, could you not?

A. Such a wooden trough could be constructed. That is, it is possible.

Q. And is concrete, in any of its forms, a conductor or a non conductor.

A. The conditions differ, whether it is a conductor. Dry concrete is a very good insulation at times. That is, it has insulating properties.

417 Q. And you could put a layer of concrete inside of such a wooden trough or a box?

A. You could build a concrete form and put a box around it. That could be done.

Q. However you did it, it would be dry inside?

A. Yes.

Q. That could be done?

A. That could be done.

Q. You could build this box or trough so that no part of it would come within 8 or 10 inches of a wire, of the wire which it was built around, couldn't you?

A. Yes, that could be constructed, as such.

Q. Now, of course, Mr. Gilliam, these 2,000 bridges that you speak of, are not all surrounded by the same physical conditions, are they?

A. I did not say 2,000 bridges.

Q. What?

A. I did not say 2,000 bridges.

Q. Didn't you?

A. He asked me as to the struts.

Q. About how many bridges are there?

A. Approximately.

Q. Never mind. I withdraw that. But all these different bridges along the system, are not all surrounded by the same physical localities?

A. Each locality is different.

Q. In some localities there is farm land for a long distance around?

A. Possibly.

Q. And in other localities like this, within two blocks, there is a tenement house district?

A. Yes.

Mr. Curtis: That is all.

Redirect examination.

By Mr. Carpenter:

Q. Do you know of any railroad in the country that has ever adopted a trough like structure, made of wood, and concrete,
418 which was described by Mr. Curtis in his hypothetical question? Do you know of any railroad that has ever adopted that practice?

A. I would like to know for what purpose.

Q. For protecting wires carried over a bridge similar to the situation at One Hundred Forty Ninth Street?

A. I do not.

Q. And will you state why that would not be, in your opinion, practicable?

Mr. Curtis: I object to that, if your Honor please.

The Court: No, you need not go into that.

Mr. Carpenter: I except.

The Court: Yes.

Q. Do you know of any engineer or board of engineers that have ever made any such recommendation for such a device, under such circumstances?

Mr. Curtis: That is objected to.

The Court: I will exclude that.

Mr. Carpenter: Exception.

Juror No. 2: Your Honor, may I ask a question of this witness as an expert?

The Court: Yes.

Juror No. 2: Do you know of any places on the very particular line which reference is made to, where there is wire screening extending over the arms, to protect or guard these live wires?

The Witness: Over or under?

Juror No. 2: Over, adjacent to it?

The Witness: I do.

Juror No. 2: The reason I ask that, is that I know of, places——

419 Mr. Curtis: I object to that, your Honor.

The Court: Objection sustained. You cannot go into an argument, or you cannot testify yourself. You can only ask the witness questions.

Juror No. 2: Thank you, your Honor.

Q. You described a situation where a screen is used over the wires, as you just answered the juror?

A. I have.

Q. Can you describe it?

A. I will. We have places on the bridges where the wires pass underneath, and screens have been put over, adjacent to the side-

walk, or pathways, so that when things are thrown over the bridge, they fall on the screen and not on the wire. We also have——

Q. Let me interrupt you a moment. Has that been used also to prevent children dropping things down on the wires?

A. Yes. We also have on the abutments, on all the bridges, where the wires pass underneath the bridges, such as the trolley wires and supporting cables to carry them, screens arranged on the side, and sometimes over the top of them, as he asked me, on top.

Q. Is there any place on the New York, New Haven & Hartford Railroad Company, where such a screen is used, where in order to get near the wire, you have got to climb up a bridge such as this, and then six feet further up a strut, such as is the situation at this bridge?

A. There is no such screen attached in similar conditions.

Q. Do you know of any situation on any other road where such a screen is used under those circumstances?

A. I do not.

420 Mr. Carpenter: That is all.

Mr. Curtis: That is all.

The Court: Are there any more witnesses?

Mr. Carpenter: One more.

The Court: Let him go on.

ERNEST R. HILL, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Carpenter:

Q. What is your name?

A. Ernest R. Hill.

Mr. Carpenter: Just a minute, Mr. Hill. Just take a seat. Pardon me. May I recall Mr. Gilliam on one point that I thought he had testified to, your Honor?

The Court: Can it be embodied in one question? I will not reopen this argument and call experts back here.

Mr. Carpenter: This is not an expert matter, your Honor. Mr. Gilliam knows about the installation of those signs. They were installed under his orders. thought he had testified to that when he was on the stand before. It is not expert testimony but the fact.

The Court: Ask him.

By Mr. Carpenter:

Q. Mr. Gilliam, will you state whether you ordered the installation of these danger signs on the bridge at One Hundred Forty-Ninth street?

421 Mr. Curtis: That we object to as incompetent, irrelevant and immaterial, and as not binding on the plaintiff.

The Court: Objection overruled.

Mr. Curtis: Exception.

Q. Did you order those warning signs installed on that bridge?
A. I did.
Q. When was that done?
A. In 1912.
Q. And where did you order them installed?

Mr. Curtis: That we object to.
The Court: Objection sustained.
Mr. Carpenter: Exception.

Q. Were they installed? They were ordered by you?

Mr. Curtis: That I object to as a conclusion.
The Court: Objection overruled.
(To the witness:) You saw them there, didn't you?
The Witness: I saw them there, yes, sir.
Mr. Carpenter: That is all. Mr. Hill, will you take the stand.
The Court: I assume that this is an expert witness?
Mr. Carpenter: Yes, your Honor.
The Court: I think it might expedite the trial if you would simply confine your hypothetical questions to the situation and the physical conditions on this particular bridge, and describe particularly the situation of the wires on the structure, and ask him his conclusion as to what that is, without going into anything else.
Mr. Carpenter: I suppose first, I ought to develop the fact as to his qualifications?
Mr. Curtis: I will admit them.
Mr. Carpenter: I will just ask him what firm of engineers he is connected with.

422 ERNEST R. HILL, resumed the stand.

The Witness: I am a member of the firm of Gibbs & Hill, consulting electrical engineers, and have been in that capacity responsible for——

Mr. Curtis: I admit all his qualifications.

By Mr. Carpenter:

Q. And you did do consulting work for the New York, New Haven & Hartford Railroad Company?
A. Yes, recently.
Q. Are you familiar with the bridge at One Hundred Forty-Ninth Street over the Harlem River, which is on the Harlem & Portchester Division of the New Haven Railroad?
A. Yes.
Q. I hand you that picture (handing picture to witness) and ask you if that recalls the situation to your memory?
A. Yes.
Q. Now, from your experience as an expert, can you say whether

that method of carrying the wires over the bridge is a reasonable and practical method, and reasonably safe?

A. It is.

Q. Under all those circumstances?

A. I would consider it so.

Q. Do you know the prevailing practice among the railroads of the country, in carrying wires similar to the New Haven's wires, as shown in the picture, over bridges under such circumstances?

A. Yes, I designed and installed several of them.

Mr. Curtis: I object. He was asked whether he knows and he goes on with a speech.

The Court: Yes.

Q. Can you state to the Court and jury whether that is the prevailing practice?

A. It is.

Q. Do you consider that in your opinion the standard practice?

A. I do.

423 Q. The witness for the plaintiff—you were not here when a gentleman from Columbia College testified, were you, Mr. Hill?

A. No.

Q. He testified that in his opinion, to make that situation safe, it would be necessary to devise a steel screen, which would be attached to the upright, underneath those wires, extending out three feet on either side of the strut or upright, so as to prevent boys from climbing up on it. Now, in your opinion, as an expert, would that be a reasonable and practical method of making that place safe, considering the purposes for which the wire is used?

A. It would not.

Q. Do you know of any railroad in the country which has adopted that practice under such circumstances?

A. I do not.

Mr. Carpenter: That is all.

Cross-examination.

By Mr. Curtis:

Q. Just about two questions, Mr. Hill?

A. Yes, sir.

Q. You understand how this wire at the present time is suspended across this bridge, by no other support, except by being attached to two bonnets, one on each side?

A. Yes.

Q. Is that right?

A. Yes.

Q. Did you hear Mr. Gilliam testify that the biggest sag that he had noticed in the middle would be about four inches?

A. Yes.

Q. Now, I just want an answer yes or no to this please, could you su-pend from one of those bonnets to the other a fibre case or covering there, which could be built big enough, so that no portion of it would touch or come in contact with the electrically charged wire?

424 Mr. Carpenter: I object to the question, if the Court please, on the ground that it is incompetent, irrelevant and immaterial, as to whether and what could be done. The sole question involved here, is what is reasonably possible and necessary.

The Court: You had better incorporate that in your question as to whether or not it would be feasible. They are not required to do the impossible.

Mr. Curtis: It is for the jury to say whether it is impossible. I am not asking them to build a tunnel around the thing. That would be impossible, but I am not going to be bound by what railroads have been doing to suit their own purposes and exigencies.

The Court: Answer the question.

Mr. Curtis: I asked him yes or no.

The Court: I do not confine him to yes or no.

Mr. Curtis: I am only asking him could it be done, that is all.

The Court: He may state.

The Witness: I would like to have the question repeated, because I do not get one word.

Q. Could you suspend from one of those bonnets to the other a fibre case or covering which could be built big enough so that no portion of it would touch or come in contact with the electrically charged wire?

A. No, it is physically impossible.

Mr. Curtis: That is all I want from you.

Mr. Carpenter: That is all.

The Court: Have you anything in surrebuttal?

Mr. Curtis: Just a little.

425 The Court: The jury can take a recess for five minutes.

Mr. Carpenter: If your Honor please, in regard to the situation that occurred her- yesterday, when I spoke of the rights of the railroad company, and its obligation with respect to the bridges, as borne out by the law, I remember Mr. Curtis said that he would make no other contention that our wires were not lawfully there, and he would make no complaint as to that of any kind.

The Court: Yes.

Mr. Carpenter: Now, in addition, I refer to our obligations in respect to maintaining that bridge, as being confined by contract, and I now ask Mr. Curtis if he will consent simply to the introduction of that portion which recites the obligation of maintenance.

Mr. Curtis: I do not concede that that has anything to do with it.

The Court: As to whether it was kept in accordance with the ordinances or how?

Mr. Curtis: There are no ordinances on this question, of how to protect the wires. There is no such ordinance.

Mr. Carpenter: Oh, yes there are.

Mr. Curtis: The law tells you how to keep your wires.

The Court: If you have any such statute on the subject, prescribing how these wires should be strung along, over all railroad bridges, I think you would be fortunate.

Mr. Carpenter: I misunderstood your Honor. There is a special statute in respect to maintaining bridges.

426 The Court: Is there any ordinance of the City of New York on that subject?

Mr. Carpenter: There is a railroad law of the State of New York, and that law recites what the defendant's obligations are in respect to maintaining this bridge, and that was the point I wanted to introduce the contract on, because that cites the agreement between the City of New York——

The Court: That would be as to the City of New York, but not as to the public, wouldn't it?

Mr. Carpenter: Your Honor, it does not add anything to the defendant's obligations, because that agreement refers to our obligations in law.

The Court: I think that would be inter alios acta.

Mr. Carpenter: Then I ask your Honor to take judicial notice of Section 93 of the Railroad Law, which says, in effect, that when a highway crosses a railroad by an overhead bridge, the framework of the bridge and its abutments shall be maintained and kept in repair by the railroad company.

The Court: Yes, I do not see any objection to that.

Mr. Curtis: There is no objection to that.

The Court: It is an obligation of the railroad company.

Mr. Carpenter: So that it does not appear that we are obliged to keep the roadway, or, under the law, that we are obliged to do anything with respect to guarding the bridge structure, and keeping people off of it.

Mr. Curtis: He is trying to distort the fact, which is that they had a knowledge of how these boys were getting there, and that is improper.

427 The Court: Well, are you through with the testimony? I do not want you to argue the case by piecemeal.

Mr. Carpenter: Wait just a minute, if the Court please.

Mr. Curtis: Just a second.

Mr. Carpenter: I think also, your Honor, that this contract between the City of New York and the New York, New Haven & Hartford Railroad Company, should go in evidence on the question of the proprietary interests of the parties in that bridge, because if the bridge was constructed pursuant to contract, and turned over to the city and dedicated to the public, the New York, New Haven & Hartford Railroad Company's proprietary interest in the bridge ceases, and terminates, and this contract, is therefore evidence, as between the parties, and shows the legal effect, and the legal proprietary interest of the New York, New Haven & Hartford Railroad Company.

Mr. Curtis: I never heard of a third party being bound by a contract between two other people.

Mr. Carpenter: Everybody is bound by the legal status of the parties, and by proprietary interests.

The Court: Suppose it was by lack of certain things required in the construction and maintenance of the bridge? That would not absolve one party or the other party. One party or the other might be held liable, and the individual could have his recourse to either. The public is not concerned about the mutual obligations of the two contractors.

Mr. Carpenter: This will bear on the question, your Honor,
428 and very importantly, in determining whether or not this railroad was obliged to expect that somebody would go over somebody else's property, and would go up on to that property, to wit, a bridge, by virtue of its construction, as they hold in their complaint, and then go ahead from somebody else's property, on to the railroad property, and bring themselves into a position of danger. Doesn't it all bear on the question very importantly?

The Court: It seems to me that all this will come under consideration for one side or the other, and that would come at the close of the testimony.

Mr. Carpenter: I ask your Honor to exercise your judicial discretion, to enable me to prove the proprietary interest in this bridge, and show that the New York, New Haven & Hartford Railroad Company had none after it was built and constructed, and turned over to the City.

Mr. Curtis: My adversary is bothered with lapse of memory. He says they were not to be called on to anticipate the proof by his own witnesses. He says finally, that they knew all about it.

The Court: I do not want any flow of oratory here. The bridge belongs to the people?

Mr. Carpenter: Yes.

The Court: And the railroad company only has an easement over it?

Mr. Carpenter: That is right. The railroad company merely is bound under its agreement with the City and under the railroad law.

The sole obligation of the railroad with respect to that bridge
429 is to maintain the abutments, and to maintain the superstructure of the bridge, but not the roadway, and the railroad company has no proprietary interest in the bridge itself, other than that obligation.

The Court: That is, to maintain the abutments and the superstructure?

Mr. Carpenter: And the superstructure.

Mr. Curtis: Your Honor, the first part of paragraph 4 still stands admitted. He cannot change our rights with regard to that, by trying to bring in anybody else.

Mr. Carpenter: Paragraph 4?

Mr. Curtis: Yes. The first part of it has never been changed.

Mr. Carpenter: The last five lines, if your Honor please, were withdrawn.

Mr. Curtis: All right; but the first part of it was not.

Mr. Carpenter: May I refresh your Honor's recolection? Before any testimony was taken——

The Court: What paragraph is it?

Mr. Carpenter: Paragraph 4. If your Honor please, before any testimony was taken I made a motion, and called your Honor's attention to the motion to amend defendant's answer, to deny the last six lines of the answer, "And as part of said bridge and railroad system and public highway," that is our system, our highway, our bridge, "there was to be incorporated certain railroad appurtenances, access to which was obtained by a flight of steps constructed from the ground." That was withdrawn, and the other part of it was left.

Mr. Curtis: You also spoke about the signals and maintenance.

430 Mr. Carpenter: Yes, it was amended to allege that we duly maintained the signals. I concede it. But that has nothing to do with the proprietary rights in the bridge. And that is the point I am speaking on now, and I contend, if the Court please, that that should be in evidence before this jury, so that they should know, under the charge of your Honor, what the defendant's responsibilities are in respect to that bridge.

The Court: If you want to show that the bridge is a public institution——

Mr. Carpenter: That has been shown.

The Court: But that the railroad company operated it, and had a public use of it, a public easement of it, and that the railroad company maintained the abutments, and whatever uses were made for getting up and down to the top of the bridge, and that the railroad company maintained the electrical parts of the superstructure on the bridge, but that the people owned the bridge, I will let that go in, but if you will admit that, there will be no necessity for offering your contract.

Mr. Curtis: What did I say yesterday before your Honor? I said, "It is a public bridge; a public highway."

Mr. Carpenter: You admit it?

Mr. Curtis: I did not admit it, I proclaimed it, and you ought to have heard it.

Mr. Carpenter: So then, it is admitted that the New Haven's proprietary interest in the bridge ceased when the bridge was built.

Mr. Curtis: No, we do not admit that. They have interests in the bridge still by using it.

The Court: If it was by the use of the railroad tracks and so forth, what difference does it make?

431 Mr. Carpenter: Our rights are defined by the Railroad Law.

The Court: You can submit your requests to charge in writing, and I will charge such as I think are proper. You are consuming a vast amount of time here. All requests to charge should be submitted before the beginning of the argument.

Mr. Carpenter: I was not dealing with the question of charging. I was dealing with the question of evidence. Does your Honor hold that I cannot show just what the propriety interest of the New

Haven Railroad were in the bridge after it was built and completed, and what the modification was in respect to maintenance? I think the contract speaks for itself.

The Court: Produce your contract.

Mr. Curtis: I object to it as incompetent, irrelevant and immaterial, and as not properly proven.

The Court: It would have to be offered as a contract. You cannot bring a printed paper here, and say it is a contract. You will have to prove it by the parties who signed it, or by the witnesses.

Mr. Carpenter: If I can produce the original, from the City of New York, I presume that would be sufficient?

The Court: If you produce it, and show it is properly certified, under the Laws of the State of New York. Do your statutes admit a certified copy without proof? I don't know whether they do in this State or not.

Mr. Carpenter: They do. I do not see that this has been
432 certified to as a copy, an accurate copy of the original, but I plead surprise on this point, because, Mr. Curtis said here yesterday that there would be no dispute and no contention or difference between us in respect to the situation in regard to that bridge, and the obligations of the parties, and I am sure your Honor will remember that I wanted to go into this question of the proprietary obligations of the parties, and as long as he now takes this position, where he will not admit the fact, which I had the right to assume, was admitted, I ask for a slight adjournment to enable me to subpœna the original, which is with the Board of Estimate for the City of New York.

Mr. Curtis: What I said yesterday, and what I say now, is that we admit that this bridge is a public bridge, and part of a public highway. I said it yesterday, and I say it again. That is all I said.

The Court: That the public had egress and ingress over it?

Mr. Curtis: Yes, sir. It is upon a public highway. I stated it yesterday, and admitted it.

The Court: I do not think anything else is necessary.

Mr. Curtis: Just the other conclusions of law, I did not say.

The Court: It does not devolve on the railroad company then, to keep them off the bridge, because it is a public place?

Mr. Curtis: Certainly.

Mr. Carpenter: Then may I ask if your Honor will so construe the railroad law as applicable to that situation, namely, that the obligation to maintain the superstructure, does not include
433 the obligation to keep people off the superstructure of the bridge?

The Court: The superstructure?

Mr. Carpenter: And the girders.

Mr. Curtis: As far as I can see, counsel for the railroad company thinks he must find out what your Honor is going to do in advance, or otherwise he will do something else.

The Court: I will consider your instructions when the time comes, to go to the jury.

Mr. Carpenter: I am embarrassed to know what the situation of

the proof is, and I ask your Honor to permit me to subpœna the original contract between the City of New York and the New Haven Railroad Company, for the purpose of showing the proprietary interest of the New Haven Railroad Company in the bridge.

Mr. Curtis: And that would not be pertinent anyway, because they cannot bind us.

The Court: I will refuse the application at this time, because I do not think, with the admissions that were made by plaintiff's counsel in Court, I think that such contract is immaterial, it being admitted that the public had the use and ingress and egress over the street part of this bridge..

Mr. Curtis: Your Honor is correct, as a matter of law.

Mr. Carpenter: May I have an exception to your Honor's ruling?

The Court: Yes.

Mr. Curtis: The plaintiff will rest.

Mr. Carpenter: I would like to make a motion, and to argue the motion first.

The Court: I do not care about much argument on the motion. Gentlemen of the jury, will you retire for about five minutes?
434 Do not go very far away, so you can be called back quickly. We want to get through with this case.

(The jury retired.)

The Court: Now you can put the grounds of your motion in the record, for the purpose of your exceptions, but I do not think it would be proper for the Trial Court to permit an argument to go into the record, because you have the opportunity, when you decide to take the case up, to argue it to the Court of Appeals. What is the use of putting in the record what you say as addressed to this Court? But just put in all your grounds.

Mr. Carpenter: That is all I will endeavor to do. I move, if the Court please, on behalf of the defendant, to have the jury instructed to render a verdict for the defendant.

The Court: That is your request?

Mr. Carpenter: That is not all.

The Court: You request that?

Mr. Carpenter: Yes, I request that. I make that motion, on the ground that the plaintiff has failed to make out a case under the attractive nuisance doctrine, on which his complaint is based; on the ground that he has failed to show the substantial features which must exist before that doctrine can be applied, to wit, accessibility of approach upon the property where the danger is.

Second. That the plaintiff has failed to show negligence on the part of the company in failing to protect that danger. Especially the items of neglect set forth in the complaint, namely, not guarding or protecting this wire.

The Court: Is there anything said in the petition as to the default of the company in not specially guarding or preventing
435 the approach of the street up to this place? It appears from the evidence in this case that this defendant's business was.

within reach of children, and that the means of ascension up to the place of danger was from the street by this trellis. One of the witnesses testified, and he was the only one, as I recall now, that he had gone up that slant, by the use of the girder, but the great majority of them testified that they ascended by means of this trellis. Have you anything in your complaint, by which you allege in your petition that that was careless?

Mr. Curtis: Certainly. We go further and say, that even after that, they should have guarded their property above.

The Court: I know that.

Mr. Carpenter: I have not quite finished.

The Court: I knew that you had not, but I wanted to know. I wanted to call his attention to it.

Mr. Carpenter: On the ground that they have failed to show that this wire was alluring and enticing, the complaint alleging that, but the infant plaintiff said that the thing that allured him——

The Court: That is argument. Just state in brief your grounds, why you think this case should be taken from the jury.

Mr. Carpenter: I am trying to make it simple, your Honor. On the ground that the plaintiff has failed to show that the wire was alluring; on the ground that the plaintiff has failed to show that the bridge was alluring, and that we were responsible for either.

On the ground that the evidence, as it stands now, shows conclusively that it was not the wire nor the bridge which allured
436 the boy there, but that it was a bird's nest which allured him to the top of the bridge, and that a bird allured him up on the strut. The wire had nothing to do with it. That is his own admission.

On the further ground, that the plaintiff has failed to establish his charge of negligence that the defendant did not properly protect this equipment, there being no proof that the defendant has not lived up to standard practice; to the reasonable standard practice.

On the further ground that the proof is that the plaintiff knew he had no right there, and that he realized his unlawfulness, and that the attractive nuisance doctrine does not apply to that situation.

On the further ground that he was guilty of contributory negligence, and his father and mother were guilty of contributory negligence.

I think that covers it, your Honor, but I thought your Honor stated, at the close of the plaintiff's case, that you would permit an argument on the law. Now, I can make it very short, and I would like to argue it out with you.

The Court: I know that I suggested the few points on which perhaps I entertained some doubt; but the development of the testimony has cleared up everything entirely and absolutely.

Mr. Carpenter: I should also include in that motion—on the ground that they have not established, either, that this company in the exercise of reasonable care and discretion, could have foreseen that this boy would be allured up there by a bird's nest, and by a pigeon on the wire.

The Court: Yes.

Mr. Carpenter: That was the lure, your Honor; it was not the wire.

437 The Court: There are two questions in it, as I suggested yesterday. One was—but any doubt which I might have entertained on that proposition has been entirely cleared up by the testimony of the defendant.

Now, before one can be charged with maintaining an attractive nuisance, in a place of danger, it must be such a place that any reasonable person could have contemplated that it was attractive, and might lead to the injury of some one, that it was within the contemplation of a reasonable mind, that such might have been the result, and then they are charged with what actually resulted.

On the other hand, if it is not such an attraction as would induce a reasonable person, or a reasonable company to suppose that such a thing would happen, then it is incumbent upon the plaintiff to show that they had notice, and if there was any lack of notice, in this case, it is not shown by the plaintiff.

The defendant comes along, and offers witnesses, who say that they reported to their superiors, that the boy was there so frequently that they thought it was dangerous, and that they had found them up in the superstructure time and again, and they had notified them, and they obviously had notice. It was simply constructive notice, about the acts of these boys from time to time that should have put them on notice, so that is proved by the evidence, as to whether they had notice, that it was attractive.

The next question, is whether the boy was a trespasser, and whether he should have been bound by the notices published there on that day.

Well, the law must be considered with reason. The bill-
438 posters' notice is not good for the man who cannot read, and it does not make any difference if one can read. The question is whether or not his mind is of sufficient capacity and development, that he can appreciate the significance of what he reads, and the dangers which are presented there is a question of fact for the jury, and that should be left to the jury in this case.

Mr. Carpenter: Of course, I would also include in my motion, if your Honor please, that the plaintiff utterly failed to show that we had any notice that boys would climb up into this superstructure. We had notice, I admit, that boys would climb on somebody else's property, the bridge, but in respect to that we had no obligation to keep them off what belonged to the city.

The Court: I asked one of your witnesses whether he had ever seen boys up in the superstructure, and he said they were running up and down the beams, in connection with the walls.

Mr. Carpenter: And the beams belonged to the City of New York, and the wall was a safe distance away from the beams.

The Court: The trellises were under the control of the company. It was their means of sending their men up there.

Mr. Carpenter: That is a point of law, your Honor.

The Court: It is useless for us to argue. I will overrule your motions, and let the record show the comments of the Court in answer to the motion to direct a verdict were in the absence of the jury, the jury having been sent out for that purpose.

Mr. Carpenter: I realize, your Honor, of course would be open to any argument that could reasonably convince you in
439 the exercise of your judicial discretion on this question. Your Honor said you would like to see the opinion in a case. I have it here.

The Court: I read it.

Mr. Carpenter: The Heller case.

The Court: I read it yesterday afternoon.

Mr. Carpenter: Was it the Heller case, your Honor?

The Court: Robinson, an infant, against the Power Company.

Mr. Carpenter: Your Honor asked me to produce a case where the Circuit Court of Appeals held that the New York, New Haven & Hartford Railroad Company was not obliged to protect the wire.

The Court: All these cases, and the law of the cases, are predicated on the facts, and it does not take but very slight facts sometimes. If it had not been shown here, that the company had full notice, and if it had not been shown by the different witnesses, as to the acts of children from seven to ten years old, then I would have been strongly inclined to take the case from the jury, upon the theory that the defendant did not have notice, that it was not a proper notice.

Mr. Carpenter: Of course, your Honor will remember, that in the Stout case, being in the leading case decided by the Supreme Court, that in all those cases the accessibility feature was emphasized by the Supreme Court. In the Stout case, you remember, there was a turntable on the ground, and there was a hole in the fence maintained by the railroad company, where people went back and forth through its property, on a path right near that
440 hole, and the boy, while playing there, fell into that, and again the Court said that the application of the attractive nuisance doctrine, as applied in the Stout case, was applicable there, but it has never gone so far, your Honor, as to apply it to a situation as this, where, in order to reach it, the boy has got to pass through an object which is perilous to his life and limb, especially a boy of this age.

In all those cases decided in the Supreme Court, he could readily go to it, by just walking on the ground, and in every case that has dealt with these high tension wires, and the maintenance of them, the accessibility feature has been the one on which the Court has held that there is no liability.

The Court: That would have been a very persuasive argument, if this boy had been the only one, or even if there were only one or two others, but here, any number of witnesses say they went up there, time and again and then those other witnesses came along, and said that they went to their head officers, and notified them that these boys were on the bridge there, little fellows, and they knew something would befall them, if something was not done.

That takes it out of a case where a boy goes into a pool, strung with barbed wire, for the first time, and where the company had no notice that boys were using the place, remote from the city, nearly a mile from the city, three-quarters of a mile, and two boys get out there and get under this wire, and go into this pool, and one of them was drowned.

That is one of the cases, and the Court took the case from the jury, and it was carried up, and the action of the Court was
441 sustained, because they had no notice. They had safeguarded this pool, and had acted under the law with reasonable prudence, and there had been no notice to them that boys were going under the wire, and endangering their safety to get to that pool. I do not want to argue the case. It is a case for the jury.

Mr. Carpenter: May I have an exception, your Honor?

The Court: All right.

(The jury returned.)

Mr. Carpenter summed up the defendant's case to the jury.

Mr. Carpenter: I have only one or two more points.

The Court: If you present one or two more points, you will surely take an hour.

Mr. Carpenter: I did not realize I was so long, your Honor.

The Court: We do not know, and we do not realize it, when we are engaged.

Mr. Carpenter: Well, I am not trying to make a speech. I am trying to make an argument. Don't you think, under the circumstances, as in view of the seriousness of the case, I should have some more time?

The Court: The jury consented to remain throughout, under the understanding that the counsel would only take half an hour. Now, you have taken forty-five minutes, but go on, for the next few minutes.

Mr. Carpenter: The police office- testified to scores of cases.
442 Mr. Curtis: There is no such proof, that he testified to scores of cases. I would like to see it.

Mr. Carpenter: All right. I will point it out to you.

The Court: You had better conclude your speech now, as soon as you can.

Mr. Carpenter finished his summation.

Mr. Curtis summed up the plaintiff's case to the jury.

(During the summing up.)

The Court: I expect you are hardly conscious of the flight of time.

Mr. Curtis: How long have I been now, sir.

The Court: Well, go ahead.

Mr. Curtis: Supposing a little Austrian boy were to come over here.

The Court: Well, that is too far to go now. The jury can im-

again that just as well as you can. You cannot take up much more time. You announced that less than thirty-five minutes was satisfactory, and it seemed to be satisfactory to the other side.

Mr. Curtis: I must say, your Honor, this is a part of the case that is important, and I do not want to be interrupted on it.

The Court: Well, go on.

(Mr Curtis finished his summation.)

443 *Charge.*

The COURT (SHEPPARD, *J.*):

Gentlemen of the jury, before approaching the issues and submitting the issues to you, I want to say if any comment or any observation made by the Court during the progress of this trial should have made any impression upon you or given you any reason to suspect that the Court had any predilections in the case, why, disabuse your minds of that.

I sometimes make comments on what I consider needless delays in the progress of a case, and as to a practice and a system that allowed such things, and I express my condemnation of that, but that, so far as this case is concerned, is entirely immaterial, and the Court, in thus speaking of things that might be remedied as regards procedure, and as to the methods of examination of witnesses, is not to be considered or understood at all, or taken by the jury, as an expression of the Court's opinion upon the merits of this case, or that the Court has any prejudice or preference one way or the other.

Now, coming to the case, it is rather a simple one. With all these long documents, with all that has been pleaded here, of assertions and denials, when stripped of legal phraseology, and coming down simply to issues that the jury can understand, and that ought to be the purpose of all pleadings—to bring the questions in dispute right down to plain and simple issues, so that the ordinary layman could grasp them and understand them.

So then, we find as the substance of this complaint, that the plaintiff, the boy, sues here in the name of his mother, who is
444 described as the guardian ad litem, and of course his next friend, suing for the benefit and for the behoof of the boy, and she says that his cause of action consists in the negligence of defendant railroad company, in not taking sufficient precautions, in not altering or changing the trellis work under this bridge, that went up, so that children could not get up on that bridge. That there was carelessness by the company in permitting that condition to exist, whereby a child of immature age, a child which they say was incapable of comprehending the dangers of the situation, ascending and getting in contact with live wires.

Again, she asserts, in her cause of action, that the company was careless and negligent in that those wires were exposed. That in view of the accessibility of the wires, and in view of the probability, that children might climb up this trellis work, and get on that super-

structure, as it is called, and get up on those wires; that the company, with due regard for the situation and conditions, should have safeguarded those wires so that children could not come in contact with them.

Now, that is the plaintiff's case made by her complaint.

The defendant says, we are not responsible. We did not cause this injury, and that it was not negligent in leaving this trellis or in installing this trellis work under the bridge, in the way it was, nor was it negligence or carelessness upon the part of the company not to have covered or protected those wires, but that the company did exercise diligence and care in preventing people from getting in-
445 jured, in that it posted notices warning persons who were passing on the bridge, and upon that public travele way, not to ascend, and that the wires overhead were charged with currents of electricity, and were dangerous, and that the company maintained this trellis work, and that it maintained and operated those wires overhead there, with due care, so far as was required or exacted of this company by the standards of other companies using bridges and wires over head in like manner, and therefore that was not negligent was not the cause of the injury, but it was the contributory negligence of the plaintiff, it was due to the negligence of the boy himself, who himself was responsible for the injuries which he sustained.

Now those are the issues.

You are to approach this case, gentlemen of the jury, upon the facts and the law, as the Court gives you the law.

Perhaps too often in this country, verdicts of juries represent the sympathy, and the charitable feelings of jurors. They should represent right and justice, and that is the purpose and object of all this demonstration, this trial here for the last three or four days; in a solemn way, and then after each side producing its witnesses, to have counsel sum up and enlighten the jury as far as they may, in explanation of the testimony, and making it as plausible as possible, for their respective theories.

That is all to reach finally, and to ultimately result in a verdict which should represent justice between the parties, without regard that one of them may be a rich railroad company, and that the other is a poor unfortunate boy.

446 So, with these comments, you now approach the question of the probabilities that are left with you, and those are simply, under the circumstances as disclosed by the testimony, whether in this case, in the light of what you have before you, there was the exercise of reasonable care and caution upon the part of the defendant company in permitting or leaving that trellis work so that it could be approached by a child and ascended by a child and be used by children as a means of getting to a place of danger; and whether or not that negligence consisted in the failure of the company as well, in not giving sufficient notice, or in not taking such steps as to prevent those who were incapable of receiving notice becoming conscious of danger, and properly appreciating notice when it was once given.

Now, you have heard the testimony in this case. You have heard

about the boy being there. You have heard how the injury occurred. You have heard the statements of the plaintiff, the boy himself, the injured boy, who was the object of the misfortune, and what he was doing at the time.

You have heard the testimony of others who said that they were there and went there frequently in playing about this bridge.

You have heard the testimony of the defendant's witnesses who testified that they had seen boys on there frequently, and had glanced up on the bridge, and realized that they were subjecting themselves to this danger, and had reported it to the officials of the company.

You heard all that. You heard the testimony of experts as to what would be considered safe, and what was considered inherently not safe.

447 Those are all matters for the jury to pass upon.

The testimony of experts is merely admitted for its illumination, or for its advantages to the jury in explaining things that you are not familiar with, and which might assist and aid you in arriving at a just verdict, and you are to consider the testimony of experts, just as you consider the testimony of other witnesses. When it is reasonable, and when it coincides with your own common sense, and when it coincides with your own experience as men, you adopt it for what you think it is worth. If you believe otherwise, that it does not comport with your own common sense, you are at liberty to disregard it, just as you would the testimony of any witness which you think, according to all the side lights of the case is unreasonable and incredible.

Now, if you believe, from the evidence in this case, that the defendant company constructed or permitted to exist a trellis under this bridge which was capable of enticing children of immature ages, and that children of immature ages did use it, and did ascend up into the superstructure of this bridge, and if you believe from the evidence under all the circumstances that that was a dangerous thing and it was not the exercise of reasonable care and caution upon the part of the company to permit it; and if you believe further in that connection, that the defendant company knew of the use that was being made by children of immature ages, indiscreet children, children not capable of appreciating danger, and they permitted it, and still allowed it and did not adopt what ordinarily reasonable and prudent persons or companies would adopt to prevent it, and that as

448 a consequence of that negligence, if it was negligence, this boy, the plaintiff, received his injuries, then you should find for the plaintiff.

Now, there has been a good deal of testimony upon the subject of notices and warning that the company contends were warnings. That the company contends were the evidence of its care, evidence that it was not negligent or careless. Well, now, the law is reasonable, and jurors in considering the facts of the case, are to exercise their reason and common sense. What may have been notice to a man or a boy of an age sufficient to appreciate either danger or warning, may not have been notice, and may not have been warning to one who was not of the age or had not the capacity to ap-

preciate danger, or even to read or to understand the warning, and when the defendant, if it had any notice, and you are to determine from all the facts in the case, whether it had notice that this bridge was subjected to the caprices of children of seven to twelve years, and whether it was so frequent as to cause employees of the company to complain about it—then whether or not the company had notice, you are to determine that from all the facts—that boys of the age from seven to twelve years, were ascending this trellis and exposing themselves in the superstructure of this bridge to the installation which the defendants say was inherently dangerous, and if the defendant knew it, did it then exercise that care and reasonable prudence that any other company or any other individual in like circumstances would have exercised to prevent just such a calamity as occurred, and if you find that they did not, then your verdict would be for the plaintiff.

449 But if you find that this boy—that, gentlemen, is the province of this jury—you heard the boy testify; you saw his manner upon the witness stand. You noticed, as it is your privilege to note, his development and his capacity. Now, as I say, the warnings, the notices, they may have been sufficient to have made the company absolutely immune from any responsibility, to some of the boys who testified in this case, and may not have been sufficient to have given notice or a sufficient caution to this boy.

You are the sole and exclusive judges of whether the boy in the particular instance, the injured boy, was one who was capable of appreciating, and one who could read, and one who could know what the consequences would be of violating these notices and these warnings.

Now, if he was of that age, or if he was not of that age, but if you believe from his manner of testifying, and from the manner in which he discussed this matter with others before this trial, that he did appreciate and was capable of appreciating the danger fully, so as to make him responsible for his conduct, then these warnings were sufficient to bind him, and it would be contributory negligence upon his part, to have done the act which he did do, and if you come to that conclusion, then your verdict should be for the defendant.

If you believe the boy was capable at the time, at the age of seven years, if you believe he was sufficiently precocious to understand the place of danger, and to understand these warnings, and so deliberately put himself into that position, upon the defendant's property, as to cause the injury, then the company would not be re-

450 sponsible, and you should find for the defendant.

That is a question for the jury. You have seen the boy. You have heard the testimony about his condition in the hospital, when he was approached by others, and when his statement was taken. You heard all that, and that is for you to say. You are to determine that matter.

The plaintiff, if he recovers at all, must recover upon a fair preponderance of the evidence. That is, the things that he alleges, he must maintain by a fair preponderance of the testimony, and that there was negligence upon the part of the defendant in maintaining this trellis so that children might climb it.

That there was negligence upon the part of the defendant in maintaining this superstructure, which was not sufficiently safeguarded, and whether that was safely guarded under the circumstances is a matter for the jury to determine from all the evidence in the case, whether the company was negligent in not protecting the wires, and in permitting this condition over the bridge. That is a matter for you to determine from all the evidence.

It is true that the railroad company, or any other persons maintaining structures of this sort, are not bound to insure people who come in contact with their works and ways and means of transport. They are not insurers of the public against them, and the only liability that can be placed on the company in this case is whether or not, under the circumstances as the case has developed, whether the notice that they had received of the use of the bridge was sufficient to give them an opportunity to change the system, so as to
451 prevent any injury that might take place, and if they did not do it, and if you are satisfied that it was negligence, in that they did not do it, and that the boy's injury was due to that carelessness on the part of the defendant, then plaintiff has made out a case by the preponderance of the evidence, and in that case, your verdict should be for the plaintiff.

Now, if you should find for the plaintiff, your verdict would be for a sum that you think would adequately compensate him for the injury sustained. That is, you will take into consideration the incapacity of the boy to earn a livelihood, as he would probably have earned it when he maintained his maturity, the livelihood that he could have earned with both limbs and with both arms.

When you approach that subject, you will take into consideration also, the probabilities as to how long he might live, and as to what education he would get, and as to how far he might compensate otherwise by preparing for particularly skillful jobs, and whether he would have acquitted himself, and adapted himself for other employment, that he would have otherwise perhaps have followed.

You are to take all those things into consideration, and also the consideration of his general health, in view of his injury, and what he suffers now, and what his probable suffering will be in the future, and you are to be governed by the testimony in the case, and you may also take into consideration the humiliation that he may experience by reason of the loss of this arm, and compensate him for that.

As to the father's case, or the father's right, you will ascer-
452 tain whatever the services of this boy would have been to his father from the time that he could become of some service, or accum-late something for his father, at whatever age you think, under the circumstances of the case, that would have been, and for such time as you think he would have continued in his father's service, allowing for his expenses, and education, and for his sicknesses or illnesses, and doctors' fees, and for all that sort of thing—altogether, what you think his services would have been worth to his father from the time he would have been able to earn, of course, considering what his earnings would be, according to your experience as

to aiding his father, deducting therefrom anything for his maintenance and education, and awarding a verdict for what you think would compensate the father for the loss sustained.

Mr. Carpenter submitted the following requests to charge:

I. Defendant not obligated to use more than standard care established by practice prevailing among companies operating such wires under similar circumstances.

II. If boy did not exercise care which boys of his age and intelligence should and that failure contributed proximately to the accident plaintiff cannot recover.

III. If boy knew he had no right there he was a trespasser and defendant owed him no active duty and he cannot recover.

Mr. Carpenter: I respectfully except to that portion of your Honor's charge in which you leave to the jury the question whether under all the circumstances the defendant should have
453 changed the practice in respect to the installation and maintenance of its wires.

The Court: Yes.

Mr. Carpenter: I have just a short charge or request, your Honor. May I read it orally?

The Court: You had better hand it up here.

Yes, gentlemen, the Court charges you, and I think I did charge you, that the defendant company is not required to adopt any different or other methods of installation of its wires than that commonly used by other companies that may use wires in that connection, and in that method of support, but you are to take into consideration in that connection, whether other companies, if informed of any practices that might have subjected children of this age to danger, then whether or not it would have been the duty of such company to have adopted means preventive of the danger that was inherent in the superstructure.

Mr. Carpenter: Upon that point, your Honor, may I take an exception, if your Honor is through with that particular request?

The Court: Yes.

Mr. Carpenter: I except to your Honor's refusal to charge as requested, without qualification, and also to the amendment which your Honor has made to the charge as requested.

The Court: Yes. Now I will repeat the other proposition to the jury, and that is whether the boy contributed to his own injury. In a case of this sort, not being an employee of any railroad company, that if he contributed to his own carelessness or negligence, contributed to his injury, why then, he could not recover, but
454 taking into consideration whether he contributed or not, you must consider the age of the boy and his capacity to understand or to appreciate the danger, and whether he properly appreciated the danger, and whether he understood the warning, even if he read them, whether he properly apprehended those warnings, and if

he did, why then, the act which he committed, would be contributing to his injury, and he could not recover.

Take the case, gentlemen.

Mr. Carpenter: Just one thing more, your Honor. Does your Honor refuse the other request to charge?

The Court: If the boy was conscious, and realized that he was doing wrong, and was doing a thing that was forbidden, and was capable of appreciating the consequences of what he was up to, then he would be contributing to his injury, and in that case you should find for the defendant.

Mr. Carpenter: I except to your Honor's refusal to charge this request, and to your Honor's modification.

The Court: All right.

Mr. Carpenter: Now, there is one more.

The Court: Well, I think unless you requested those, and sent them up, before you commenced the argument, I will not charge it. The rule is that all requests and instructions must be handed up to the Bench before the argument begins, but I have indulged you to this extent.

Take the case, gentlemen.

Mr. Curtis: Will your Honor charge the jury about the question of preponderance, and that that does not mean the number of witnesses?

455 The Court: Why, no. It is testimony that convinces you, that fastens upon your minds, in the light of all the circumstances testified to, as to what you think is most reliable. That is what is meant by preponderance.

Mr. Carpenter: Will your Honor charge the jury that the burden on all points is on the plaintiff himself?

The Court: Yes, the burden, both on the negligence of the defendant company, as to the trellis, and as to the superstructure.

Mr. Curtis: Your Honor charged that in the main charge.

The Court: Yes, I did.

The jury thereupon retired.

The jury return to court and announced a verdict in favor of the plaintiff, David Fruchter, in the sum of Ten thousand dollars, and a verdict of One thousand dollars in favor of Sam Fruchter, the father.

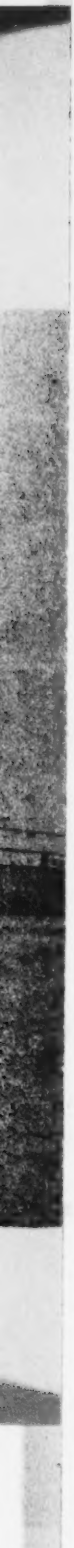
The Court: You are excused, gentlemen, until tomorrow morning.

Mr. Carpenter: Now, if your Honor please, I move to set the verdict aside, on the ground that it is against the law and against the evidence.

The Court: I will deny the motion.

Mr. Carpenter: May I have an exception?

The Court: Yes.



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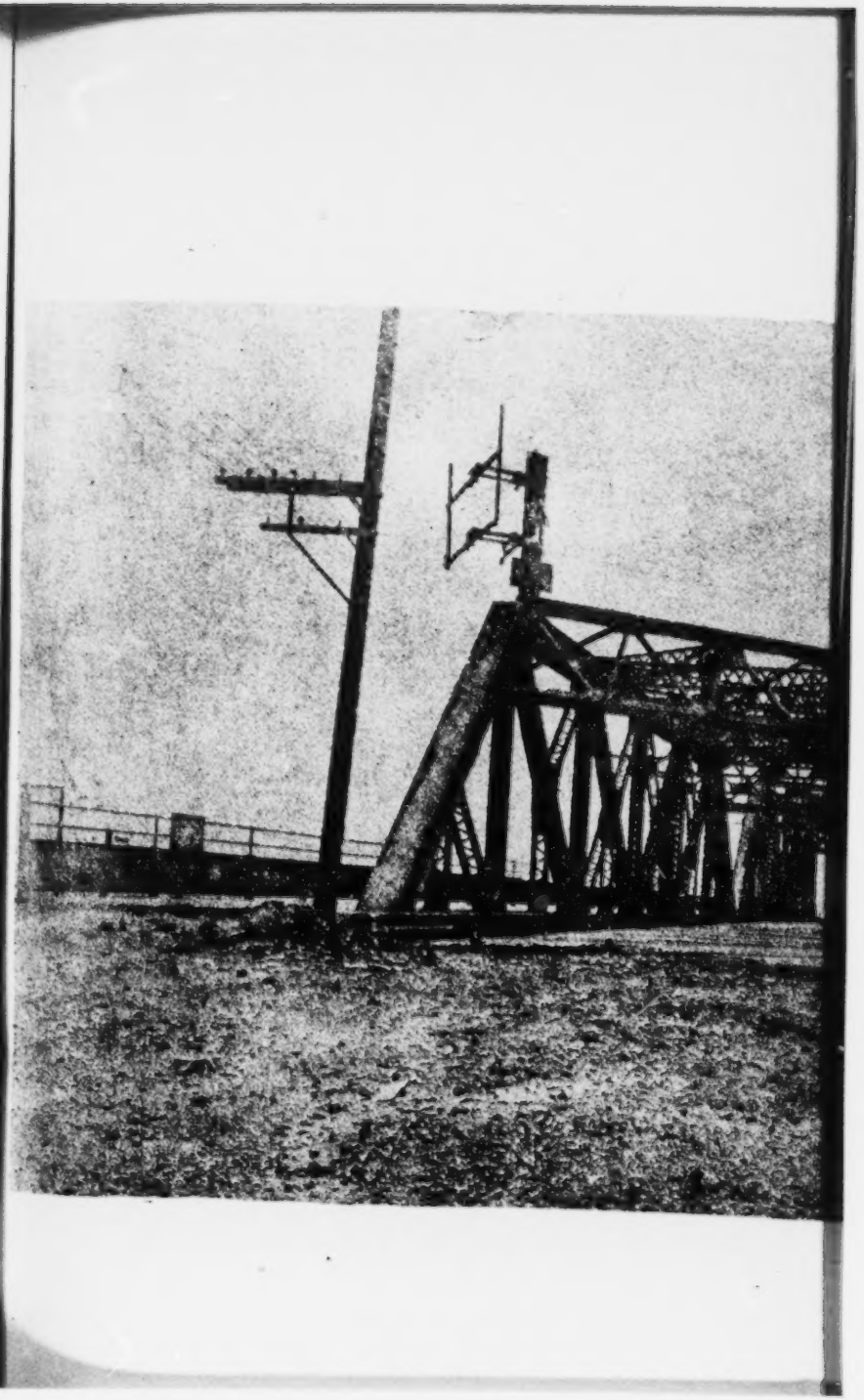

Nos. 766
767

{ NY H & H R R
v
Fruchter }

7456

Nos 766
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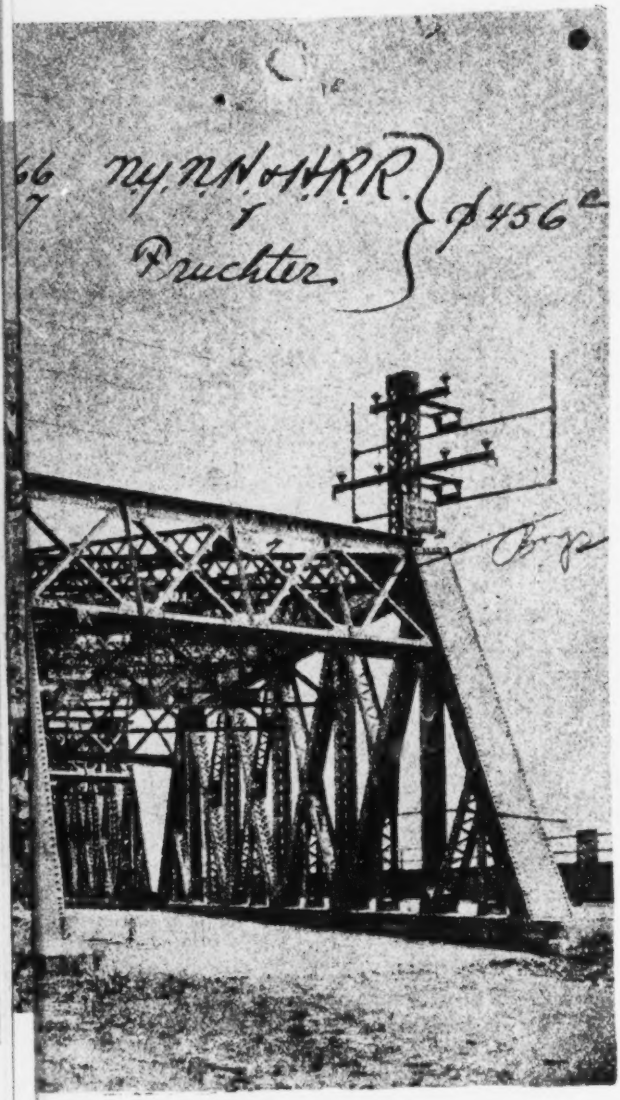
NY N H & H R R Co
v
Pinchbeck
7456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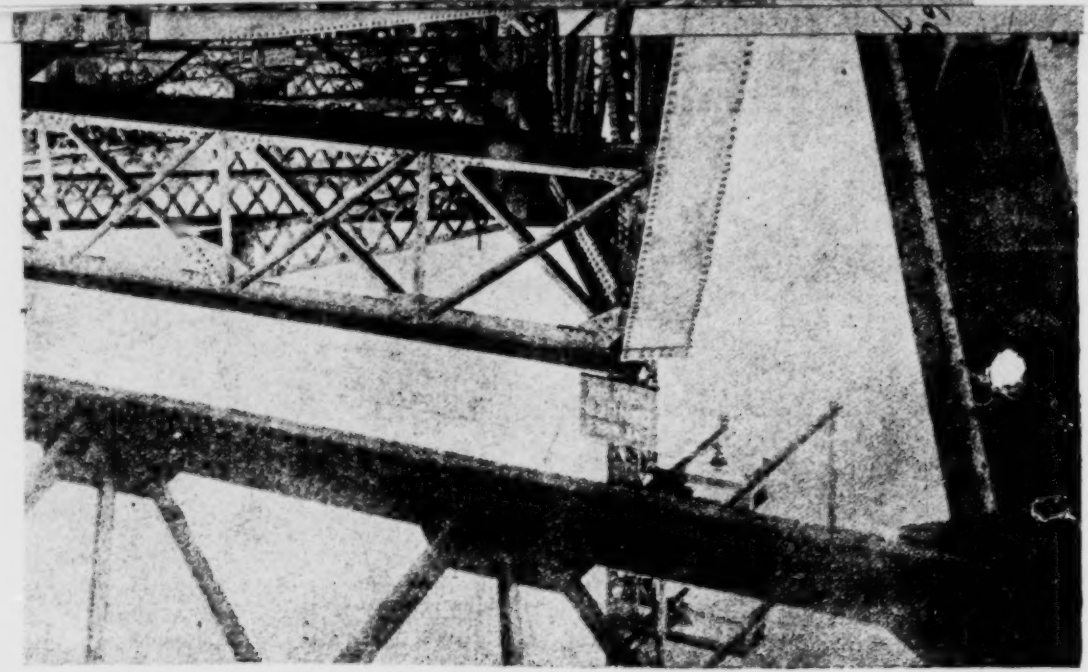

Mr. Curtis: Just for the sake of the record, your Honor, I think my friend ought to move for a stay.

The Clerk: He gets a 10 days' stay automatically.

456 Mr. Curtis: I will give him all he wants anyway.

Mr. Carpenter: I knew you would. And may I also move, your Honor, on the exceptions taken during the trial?

The Court: Yes.

(Here follow photographs marked pages 456*a* to 456*e*, inclusive.)

457 *Stipulation in re Printing Cases in Same Record.*

United States District Court, Southern District of New York.

DAVID FRUCHTER, an Infant, by JENNY FRUCHTER, His Guardian ad Litem, Plaintiff,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

SAM FRUCHTER, Plaintiff.

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

In view of the fact that both of the above named cases were tried together and at the same time and before the same Court and jury, It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the appeal in both cases may be combined and printed together in the same appeal record.

Dated, New York, September 9th, 1920.

LEON SANDERS,
Attorney for Plaintiffs.
JOHN M. GIBBONS,
Attorney for Defendant.

458 *Clerk's Certificate.*

United States District Court, Southern District of New York.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Plaintiff-in-Error,

against

DAVID FRUCHTER, an Infant, by JENNY FRUCHTER, His Guardian ad Litem, Defendant-in-Error.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Plaintiff-in-Error,

against

SAM FRUCHTER, Defendant-in-Error.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America, for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter, as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 27 day of October in the year of our
459 Lord one thousand nine hundred and twenty and of the Independence of the said United States the one hundred forty-fifth.

ALEXANDER GILCHRIST, JR.,
Clerk.

Stipulation Settling Bill of Exceptions.

United States District Court, Southern District of New York.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Plaintiff-in-Error,

against

DAVID FRUCHTER, an Infant, by JENNY FRUCHTER, His Guardian ad Litem, Defendant-in-Error.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Plaintiff-in-Error,

against

SAM FRUCHTER, Defendant-in-Error.

It is hereby stipulated and agreed that the foregoing is a
460. true transcript of the record of the said District Court in the above entitled matter, as agreed on by the parties.

Dated October 11, 1920.

JOHN M. GIBBONS,
Attorney for Plaintiff-in-Error.
LEON SANDERS,
Attorney for Defendant-in-Error.

Order Settling Bill of Exceptions.

On the above stipulation, the foregoing Case on Appeal, containing all the evidence, is hereby settled and ordered on file.

Dated, October 20, 1920.

WM. B. SHEPPARD,
U. S. D. J.

461 United States Circuit Court of Appeals for the Second Circuit.

Before

Hon. Henry Galbraith Ward,
Hon. Charles Merrill Hough,
Hon. Martin T. Manton,
Circuit Judges.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Plaintiff-in-Error,

against

DAVID FRUCHTER, an Infant, by JENNIE FRUCHTER, His Guardian ad Litem, Defendant-in-Error.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Plaintiff-in-Error,

against

SAM FRUCHTER, Defendant-in-Error.

Writs of Error to Judgments Entered in the District Court for the Southern District of New York.

Defendant below (hereinafter called the Railroad Company) maintains a well known transportation system leading out of New York City, and its lines within the City limits and further are operated by an overhead electrical system.

462 At 149th Street is a bridge or viaduct belonging to the City of New York, constructed in 1908, and crossing the sunken tracks of the Railroad Company. It is 270 feet long and 54 feet wide.

This City bridge is of standard construction and is so formed of posts, beams and girders, strengthened and connected by trellis or lattice work that it is quite possible for active men or boys to climb to the uppermost chords of the bridge some 24 feet above the roadway.

Since 1912 the Railroad Company, with permission from the City, has carried its wires over the bridge resting on porcelain insulators which are fastened to cross-arms, which in turn are attached to an upright structure of steel, itself affixed to the top girders or chords of the bridge. This construction is also standard. On June 9, 1916, David Fruchter was a lad whose eighth birthday would occur in the following month. He lived in the general neighborhood of the bridge, which is a rather crowded region abounding with small boys. He had seen (according to his own statement) other boys playing upon these girders a few days before, and he seems to have been aware that to do likewise within sight of a policeman or railroad

worker was not wholly safe. On the day mentioned he found himself unwatched, and climbed to the top girder of the bridge (as he says) to get a pigeon's nest. He then saw a pigeon on one of defendant's wires, and so climbed up the upright structure aforesaid, reached out for the pigeon, and when it flew away brought
463 his hand in contact with the live wire, causing the personal injuries to recover for which he brought suit.

Sam Fruchter is the father of this boy, and his action rests on the same facts and is for loss of services. The cases were tried together before the same jury.

The trial Court charged the jury that if the evidence persuaded them that the Railroad Company had

"permitted to exist a trellis under this bridge which was capable of enticing children of immature ages, and that children of immature ages did use it and did ascend into the superstructure of this bridge, and if (the jury believed) that that was a dangerous thing and that it was not the exercise of reasonable care and caution to permit it,—and if (the jury believed that the Railroad Company) knew of the use that was being made of it by children of immature ages, indiscreet children, children not capable of appreciating danger, and (the Railroad Company) permitted it, and still allowed it, and did not adopt what ordinarily reasonable and prudent persons would adopt to prevent it, and that as a consequence of that negligence,—if it was negligence"

the plaintiff received his injuries, he and his father were both entitled to verdicts.

There was evidence that for a long time before this accident boys had been in the habit of climbing to the top of the bridge, that they had been ordered away by policemen and workmen because of the danger not only of climbing to such a height, but of the known danger arising from the Railroad Company's wires on top of the bridge structure.

Over motions duly made to dismiss or direct, the Court thus submitted the matter to the jury. Both plaintiffs had verdicts and the Railroad Company took these writs.

464 John M. Gibbons, attorney for plaintiff-in-error, James W. Carpenter, F. J. Rock and H. M. French of counsel;

Leon Sanders, attorney for defendants-in-error, Harold R. Medina, George M. Curtis and Jacob Zelenke, of counsel.

HOUGH, *C. J.*:

It is too obvious to need comment that the Court below treated the claim in suit as covered by what are known as the "attractive nuisance," "lure" or "trap" cases.

Since, so far as the Courts of the United States are concerned, these cases are all assumed to rest on Railroad Co. vs. Stout, 17 Wall., 657, the word "nuisance" is inappropriate. A nuisance is that which "unlawfully worketh hurt, inconvenience or damage," and neither the turntable of the Stout case nor the electric wire here to be con-

sidered was a nuisance; both were lawful enough. But many a lawful thing may be so negligently managed, handled or maintained as to give rise to causes of action in tort. The true doctrine is that any composition of matter which lures or attracts the confiding ignorance of childhood to its own harm must be safeguarded as circumstances require;—and of course the circumstances vary in almost every instance.

We are first seriously requested to abandon the doctrine of the Stout case because it is said to have been rejected by the Courts of the State of New York.

The request is a large one considering how fully, after elaborate investigation, the ruling was re-stated in Union Pacific, etc. Co. vs. McDonald, 152 U. S. 262 (279), and our own acknowledg-
465 ment of its binding effect recently made in Heller vs. New York, etc. Co., 265 Fed., 192.

But if we wished to depart from the doctrine in question we could not, for the matter is one of general law and we are bound (in the absence of any statutory change by competent authority) by the decisions of the Supreme Court as review at some length in Baltimore & Ohio R. R. Co. vs. Baugh, 149 U. S., 368, and very recently restated by Justice Pitney, dissenting, in Southern Pacific vs. Jensen, 244 U. S., at 249,—the dissent not dealing with this proposition directly.

It is further asserted that the "lure" cases have no application because "there is nothing alluring about a wire maintained at such a height." The essence of allurement is temptation, and the difference between invitation and temptation is acutely intimated in Erie Co. vs. Hilt, 247 U. S., at 101. Where, for physical convenience or business advantage, men incilne to take a pathway across a railway track or the like in order to reach a business place of the owner of the dangerous region traversed, an invitation may be inferred which takes away the sting of trespass. This is no such case.

The question here was whether the bridge, with its apparatus of wires on top, was or was not a temptation to children;—that was a question of fact as to which there was evidence from which the jury might find that it had proved such a temptation for a long time.

That it was dangerous was too obvious for argument, and therefore if the danger was known and the temptation to children also known and known to the defendant, it was a question for the jury
466 to declare whether the absence of guards either human or mechanical did not constitute negligence.

This is the substance of our ruling in the Heller case, supra, where, as may be noted, the verdict of the jury had negatived negligence.

Whether a jury issue is presented in any given case depends upon a multitude of circumstances; we said in the Heller case that the plaintiff's "extraordinary act was not one that defendant could be expected to have foreseen and which it could have anticipated" (page 199). Considering the evidence in this case we conclude that there was evidence from which the defendant could have foreseen that some boy would in a spirit of bravado do exactly what this boy did,

and under the Stout case just such troublesome boys are entitled to be protected against themselves.

It is noted that the defendant's structure was lawfully placed on top of the city bridge, and that probably the prime temptation for a boy was clambering up the bridge, which did not belong to defendant. But it was perfectly possible to physically protect the wire which did belong to defendant, while leaving the protection of the bridge to its own proprietor. This difference in ownership does not make any difference in the law (Electric, etc. Co. vs. Healy, 65 Kan., 798).

Plaintiff in error complains of certain remarks of the trial court as unduly prejudicing the presentation of its case to the jury. The language complained of relates to two subjects—(1) unfavorable comments upon the prolixity of counsel, and (2) statements
467 exhibiting repugnance to the attempts of employees of defendants below to procure a statement regarding the particulars of the accident from the infant defendant while he was still in the hospital.

Consideration of the record herein leads to the holding that as to the first branch of the Court's remarks the Judge was entirely within the rights of any trial court, and that the comments were more than justified.

The second series of remarks was calculated to induce belief that defendant's agents were unfairly attempting to secure damaging admissions from so small a boy. They constitute error; but having regard to the very careful direction of the colloquial charge that the jury should disregard all comments of his own, and to the extreme moderation of the verdicts awarded by the jury, we are unable to perceive that the error was harmful, for the only injurious effect that could have resulted was possibly to aggravate damages through sympathy. Nothing that was said tended to bolster up the plaintiff's cause of action; but the verdicts show that there was no aggravation. Consequently the error was harmless. (Austro-American, etc. Co. vs. Thomas, 248 Fed., at 234).

The judgments are affirmed with costs.

468 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. The New York, New Haven & Hartford Railroad Co. against David Fruchter and another case. (Copy.) Opinion. Hough, Circuit Judge.

469 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 19th Day of February, One Thousand Nine Hundred and Twenty-one.

Present:

Hon. Henry G. Ward,
Hon. Charles M. Hough,
Hon. Martin T. Manton,
Circuit Judges.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Plaintiff in Error,

v.

DAVID FRUCHTER, an Infant, by JENNIE FRUCHTER, His Guardian ad Litem, Defendant in Error.

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. G. W.
C. M. H.

470 Endorsed: United States Circuit Court of Appeals, Second Circuit. N. Y., N. H. & H. R. R. Co. v. David Fruchter. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 23, 1921. William Parkin, Clerk.

471 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 19th Day of February, One Thousand Nine Hundred and Twenty-one.

Present:

Hon. Henry G. Ward,
Hon. Charles M. Hough,
Hon. Martin T. Manton,
Circuit Judges.

New York, New Haven and Hartford Railroad Company,
Plaintiff in Error,

v.

Sam Fruchter, Defendant in Error.

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. G. W.
C. M. H.

472 Endorsed: United States Circuit Court of Appeals, Second Circuit. N. Y., N. H. & H. R. R. Co. v. Sam Fruchter. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 23, 1921. William Parkin, Clerk.

473 United States of America,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 472 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cases of New York, New Haven & Hartford R. R. Co. v. David Fruchter, an infant, and Same v. Sam Fruchter as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 23d day of February

in the year of our Lord One Thousand Nine Hundred and twenty-one and of the Independence of the said United States the One Hundred and forty-fifth.

[Seal of the United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

474 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which The New York, New Haven & Hartford Railroad Company is plaintiff in error, and David Fruchter, an infant, by Jennie Fruchter, his Guardian ad litem, is defendant in error, L20-271, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the
475 Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixteenth day of April, in the year of our Lord one thousand nine hundred and twenty-one.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 28,123. Supreme Court of the United States, October Term, 1920. No. 766. The New York, New Haven & Hartford Railroad Company vs. David Fruchter, an infant, etc. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 26, 1921. William Parkin, Clerk.

476 The Supreme Court.

No. 766.

DAVID FRUCHTER, an Infant, by JENNY FRUCHTER, His Guardian ad Litem, Plaintiff and Appellee,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant and Appellant.

Stipulation as to Return to Writ of Certiorari.

In the above entitled cause, it is hereby stipulated that the certified transcript of record, on file in the office of the Clerk of the Supreme Court of the United States, in the matter of The New York, New Haven and Hartford Railroad Company, petitioner, for a writ of certiorari, against David Fruchter, an infant, by Jenny Fruchter, his guardian ad litem, respondent, and there numbered 766 on the October Term, 1920, upon the docket of said Court shall stand as a return by this Court to the writ of certiorari issued by the Supreme Court of the United States.

Dated, New York, April 23, 1921.

JAMES W. CARPENTER,
Attorney for Petitioner.
LEN SANDERS,
Attorney for Appellee.

477 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York April 26th, 1921.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

478 [Endorsed:] 766/28,123. United States Circuit Court of Appeals, Second Circuit. New York, New Haven and Hartford R. R. Co. v. David Fruchter, an infant. Return to Certiorari. No. 21.

479 [Endorsed:] File No. 28,123. Supreme Court U. S. October Term, 1920. Term No. 766. The New York, New

Haven & Hartford R. R. Co., Petitioner, vs. David Fruchter, an infant, etc. Writ of certiorari and return. Filed April 29, 1921.

480 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which The New York, New Haven & Hartford Railroad Company is plaintiff in error, and Sam Fruchter is defendant in error, L20-272, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

481 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixteenth day of April, in the year of our Lord one thousand nine hundred and twenty-one.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 28,124. Supreme Court of the United States, October Term, 1920. No. 767. The New York, New Haven & Hartford Railroad Company vs. Sam Fruchter. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 26, 1921. William Parkin, Clerk.

482 The Supreme Court.

No. 767.

SAM FRUCHTER, Plaintiff and Appellee,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant and Appellant.

Stipulation as to Return to Writ of Certiorari.

In the above entitled cause, it is hereby stipulated that the certified transcript of record, on file in the office of the Clerk of the Supreme Court of the United States, in the matter of The New York, New

Haven and Hartford Railroad Company, petitioner, for a writ of certiorari, against Sam Fruchter, respondent, and there numbered 767 on the October Term, 1920, upon the docket of said Court shall stand as a return by this Court to the writ of certiorari issued by the Supreme Court of the United States.

Dated, New York, April — 1921.

JAMES W. CARPENTER,
Attorney for Petitioner.
LEM SANDERS,
Attorney for Appellee.

483 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York April 26th, 1921.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

484 [Endorsed:] 767/28,124. United States Circuit Court of Appeals, Second Circuit. New York, New Haven & Hartford R. R. Co. v. Sam Fruchter. Return to Certiorari. N. 21.

485 [Endorsed:] File No. 28,124. Supreme Court U. S., October Term, 1920. Term No. 767. The New York, New Haven & Hartford Railroad Company, Petitioner, vs. Sam Fruchter. Writ of certiorari and return. Filed April 29, 1921.

Office Supreme Court,
FILED
FEB 26 1921
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1920.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,
against
DAVID FRUCHTER, an infant, by JENNY FRUCHTER, his guardian ad litem,
Respondent.

No. [redacted]

No.....

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,
against
SAM FRUCHTER,
Respondent.

No. [redacted]

PETITION FOR A WRIT OF CERTIOARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

JAMES W. CARPENTER,
Attorney for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1920.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,
against
DAVID FRUCHTER, an infant, by JENNY FRUCHTER, his guardian ad litem,
Respondent.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,
against
SAM FRUCHTER,
Respondent.

Notice.

TO LEON SANDERS,
Counsel for Respondents:

PLEASE TAKE NOTICE that on Monday, March 28th, 1921, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, a petition for writ of certiorari in the above cases will be submitted to the Supreme Court of the United States at Washington, D. C.

In support of said petition, a brief will also be presented, and copy of said petition and brief are herewith served upon you.

JAMES W. CARPENTER,
Counsel for Petitioner.

Service of the foregoing notice and copies of the petition and brief herein mentioned, is hereby acknowledged this 12th day of March, 1921.

LEON SANDERS,
Counsel for Respondents.

Petition.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1920.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,
vs.
DAVID FRUCHTER, an infant, by JENNY FRUCHTER, his guardian ad litem,
Respondent.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,
vs.
SAM FRUCHTER,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, respectfully shows:

1. Your petitioner is a corporation of the State of Connecticut, and was the defendant below in each of the above entitled actions, and the plaintiff-in-error in the

United States Circuit Court of Appeals for the Second Circuit on writ of error taken to review the judgments entered against it in the said actions in the United States District Court for the Southern District of New York.

2. These suits were commenced in the Supreme Court of the State and County of New York by the service of summons on the day of January, 1917. The plaintiff, David Fruchter, an infant, sued to recover damages for personal injuries sustained by him on June 9, 1916, from contact with one of petitioner's electric wires which was carried over the top of a municipal highway bridge at 149th Street in New York City. The plaintiff, Sam Fruchter, the father, sued for loss of services and the cost of medical expenses occasioned by said accident. Pursuant to applications duly made by your petitioner to the said District Court to remove these suits thereto on the ground of diversity of citizenship of the parties, the plaintiffs being citizens of the State of New York and your petitioner being a railroad corporation of the State of Connecticut, the suits were removed to said court on the 28th day of July, 1919.

3. Issue was duly joined in each action. By stipulation between the parties both cases were tried together in August, 1920, before Honorable William B. Sheppard and a jury. The Trial Court denied your petitioner's motions for a directed verdict in each case. Verdicts were rendered in favor of the plaintiff, David Fruchter, for the sum of $10,000., and in favor of the plaintiff, Sam Fruchter, for the sum of $1,000., and judgments were thereupon entered in the office of the clerk of the District Court in favor of the plaintiff, David Fruchter, for the sum of $10,118.03 and in favor of the plaintiff, Sam Fruchter, for the sum of $1,038.21, on the 24th day of

August, 1920. Pursuant to writs of error, allowed on the 14th day of September, 1920, the Circuit Court of Appeals for the Second Circuit reviewed the record and judgments herein of the District Court, and after argument held on the 12th day of January, 1921, it unanimously affirmed the same in a written opinion on the 9th day of February, 1921, holding that the attractive nuisance doctrine was applicable, that the question of negligence was for the jury and that there was no harmful error by the Trial Court.

4. These actions were based on the attractive nuisance doctrine. There was evidence from which the jury might have found the following facts:

The plaintiff, David Fruchter, when about eight years old, was injured by contact with an electric wire of your petitioner, while climbing from the superstructure of a municipal highway bridge up the pole or strut of your petitioner, affixed to the top thereof, in quest of a pigeon perched on one of the propulsion wires attached with porcelain insulators to one of the cross-arms of said strut. The bridge was located in the Borough of the Bronx, City of New York, at 149th Street, and carried said street over the depressed right of way of the Harlem River Branch of petitioner's railroad. It was a steel bridge of modern design about 25 ft. high, with steep batter posts 28 ft. long and difficult of ascent, with supporting perpendicular columns having necessary trellis work thereon, designed to steady the bridge under stress and strain and not as a scaling ladder for public use, all of which were surmounted by horizontal girders or chords which were 2 ft. high and constituted a dangerous obstacle to a climbing boy of plaintiff's age. The bridge was built in 1908. In 1912 your petitioner's railroad was electrified and some of its wires were carried over said

bridge by means of struts affixed as aforesaid and eight warning signs "Live Wires, Danger, Keep Off," were installed on said bridge, one being attached to the base of each strut, with the consent of the City.

The boys in the neighborhood frequently played in and about the superstructure of the City's bridge. Of this your petitioner had notice. Over a period of years two boys had climbed part way up petitioner's structure affixed to the top of the bridge. Of this your petitioner had no notice. For a long time prior to the accident your petitioner had assigned men to guard this and other bridges over which its wires were for the purpose of keeping boys off. They had frequently chased them off this very bridge. Although no arrests were made, in at least one instance, your petitioner caused a boy to be apprehended and taken to his parents. The boys, including the plaintiff, admitted that they would not have climbed the bridge if a police officer had been near, and some of them, including the plaintiff, admitted they would not if men were working thereabouts.

On June 9th, 1916, the day of the accident, the plaintiff, who had been over the bridge but once before, proceeded to the same on his way to the East River. Another boy accompanied him who was not called as a witness. Arriving at the bridge he led the way into its superstructure to reach a bird's nest he saw there. On gaining the top of the bridge his attention was attracted to a pigeon perched on petitioner's wire attached to the first cross-arm of the strut 6 ft. 6 ins. above the top of the bridge and 19½ ins. out from the upright. In order to seize the bird he climbed the strut and reached toward it. It flew away and his hand came in contact with the wire causing the burns which made amputation of the arm necessary.

Your petitioner has 2000 struts carrying high voltage wires along its right of way being constructed, in part, of trellis work similar to the one in the accident.

5. Your petitioner respectfully contends that the Trial Court erred in declining to direct a verdict in its favor, to which it excepted and the Circuit Court of Appeals erred in its affirmance, for the following reasons:

(a) The so-called attractive nuisance doctrine, as defined by this Court in *Railroad* vs. *Stout*, 17 Wall 657, and *Union Pacific, etc. Co.* vs. *McDonald*, 152 U. S. 262, was not applicable because there was no duty on your petitioner to protect the plaintiff in the manner alleged under the proof, because it was not the bridge nor this petitioner's structure which lured the plaintiff to his injury, but the bird's nest and the bird (*Erie R. R.* vs. *Hilt*, 247 U. S. 97, 101), because the plaintiff was not an invitee or licensee, nor did your petitioner have notice of boys using its property as a playground or otherwise, nor did your petitioner acquiesce in such use of either its property or that of the City, because neither the property of the City nor of your petitioner was readily accessible to children, because there was no defect in the property of either the City or your petitioner, nor was it constructed or maintained in violation of standard practice.

(b) The complaint alleged, the case was tried and submitted to the jury on the theory that as the strut was affixed to the bridge it was practically a part of it and your petitioner was obliged to provide guards to keep boys off the bridge and to protect them from the wires by insulation or guards of some kind, whereas Section 93 of the Railroad Law provided at the time of the accident and still provides, as follows:

> "Where a highway crosses a railroad by an overhead bridge, the framework of the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the roadway thereover and the approaches thereto shall be maintained and kept in repair by the municipality," etc.,

and the State Courts have uniformly held that that obligation is limited to maintenance and repair.

(c) The Courts below were required, at least by comity, to follow the decisions of the highest court of the State of New York, because it has so steadfastly rejected the attractive nuisance doctrine, that it has become a fixed state rule of property and action.

(d) The Trial Court's criticisms of your petitioner's efforts to secure a statement from the plaintiff while in the hospital, which the Circuit Court of Appeals found to be error, were presumitively harmful, and there was nothing to show they did not sway the jury into rendering a verdict for the plaintiff.

6. Your petitioner respectfully contends that this Honorable Court should grant a writ of certiorari for the following reasons:

(a) Because the question as to whether the so-called attractive nuisance doctrine is applicable to these facts is of grave importance, not only to this petitioner which operates an electrical high tension system of railroad through parts of the States of New York and Connecticut, the wires of which are carried along the right of way by struts similar in kind to that involved in the accident, but to other railroads, electric light companies and property owners maintaining dangerous instrumentalities on their premises.

(b) Because there is a conflict between the decisions of the Circuit Court of Appeals for the Second Circuit on the one hand, and those of the highest courts of the States of New York and Connecticut on the other, as to the applicability of that doctrine, in both of which States the rule declared has become a fixed state rule of property and action, *Walsh* vs. *Fitchburg R. R.*, 145 N. Y. 301; *Birch* vs. *City of New York*, 190 N. Y. 397; *Johnson* vs. *City of New York*, 208 N. Y. 77; *Vaughan* vs. *T. D. Co.*, 222 N. Y. 79; *Freeman* vs. *B. H. R. R. Co.*, 75 N. Y. App. Div. 596; *Fitzmaurice* vs. *The Conn. Rwy. Co.*, 78 Conn 406; *Wilmot* vs. *McPadden*, 79 Conn. 367; *Pastorello* vs. *Stone*, 89 Conn. 286.

(c) Because there is a conflict between the decisions of the Circuit Court of Appeals of the Second and Third Circuits (please see *Snare & Triest* vs. *Friedman*, 169 Fed. 1) as to whether the Federal Court should follow the decisions of the highest court of the state which have so steadfastly rejected the attractive nuisance doctrine that it has become a fixed state rule of property and action.

(d) Because the case involves the effect of Section 93 of the Railroad Law of the State of New York as to the obligation of a railroad company toward the superstructure of a highway bridge over its right of way, as to which the state courts have uniformly held that the duty is confined to maintenance and repair, *City of Yonkers* vs. *N. Y. Cent. R. R.*, 165 N. Y. 142; *In re, N. Y. Cent.*, 168 App. Div. 6, affd. 216 N. Y. 722; *Town of Cortland* vs. *N. Y. Cent.*, 175 App. Div. 194, affd. 220 N. Y. 598; *Murphy* vs. *D. & H. Co.*, 151 App. Div. 351.

7. Your petitioner respectfully contends that the questions recited or referred to herein, in paragraphs

five and six, are duly raised in the record of the court below, and your petitioner is informed and believes that, with the possible exception of the question relating to comity, they have never heretofore been presented to this Court for determination.

WHEREFORE, your petitioner prays that this Honorable Court will grant its writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to bring up this case to this Honorable Court for such proceedings thereon as to this Honorable Court may seem just.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,

By

EDWARD G. BUCKLAND,
Vice-President and General Counsel.

JAMES W. CARPENTER,
Attorney for Petitioner.

State of New York, }
County of New York. } ss.:

EDWARD G. BUCKLAND, being duly sworn, deposes and says: I am the Vice-President and General Counsel of The New York, New Haven and Hartford Railroad Company, the petitioner named in the foregoing petition. The same is true of my own knowledge and belief, except in so far as it refers to the transcript of the case and to the circumstances of the accident, and the litigation resulting, as to which my knowledge is received from information given to me by the attorneys of said Railroad Company.

EDWARD G. BUCKLAND.

Subscribed and sworn to at the City of New York, State of New York, this 23rd day of February, 1921, before me, a Notary Public in and for said County and State, duly commissioned and sworn, as witness my hand and official seal.

MILTON E. GILES,
Notary Public, Westchester County.
Certificate filed in New York County No. 475.
Term expires March 30, 1921.

Certificate of Counsel.

I HEREBY CERTIFY that I have examined the foregoing petition and in my opinion the petition is well founded and the case is one in which the prayer of the petitioner should be granted by this Court.

JAMES W. CARPENTER,
Of Counsel with Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This petition presents the following questions which are of grave import to your petitioner, to other companies engaged in intra and interstate commerce, to property owners lawfully maintaining instrumentalities on their premises, pursuant to standard practice, which are of necessity dangerous to those who come in contact with them, and to the nation itself, in that they involve: (a) a possible extension of the attractive nuisance doctrine to limits heretofore undreamed of, closely approximating in loco parentis to the mere stranger within his gates without his knowledge, and (b) the right of States to establish within their boundaries and constitutional limits inviolable rules of property and conduct:

(1) Assuming that the Court below could invoke the attractive nuisance doctrine, approved by this Court in *Railroad* vs. *Stout,* 17 Wall 657, was it applicable to the pleading and proof herein where this eight year old boy deliberately and furtively evaded municipal and railroad police, and without invitation, license or notice to petitioner climbed in quest of a bird's nest to the top of the superstructure of a huge, steel, modern, municipal highway bridge, to which were attached eight warning signs: "Live Wires Danger Keep Off", the bridge being located at 149th Street in the Borough of Bronx, City of New York, and carrying said street over petitioner's depressed right of way, and from there scaled a modern, steel strut, belonging to petitioner, lawfully affixed to the top of the bridge superstructure, carrying highly and electrically charged propulsion wires for railroad purposes, at a height far above the roadway, in quest of a pigeon perched on one of those wires, contact with which resulted

in the boy's injury, the wires being maintained on porcelain insulators attached to the cross arms of said strut at a safe height above the bridge superstructure pursuant to prevailing practice, without any defect in equipment, and the State statutory obligation of petitioner toward the bridge superstructure being limited to maintenance and repair?

(2) Was the Court below at liberty to apply the attractive nuisance doctrine hereto when the highest court of the State of New York had so steadfastly rejected it, that that had become a fixed state rule of property and action? Did not the State of New York have the power, through its Court of last resort, to establish within its boundaries and constitutional limits an inviolable rule of local property and action? Or, did the Federal Court of that Circuit have the power to destroy, in a large measure, not only that rule, but a similar rule in the State of Connecticut where petitioner operates its railroad—rules which have stood the test of years of adjudication? Conceding it had the power for argument's sake, did not comity preclude such action? How is the variance between the Court below and the Circuit Court of Appeals for the Third Circuit on the question of the effect of a state rule of property and action to be finally resolved?

(3) Was it proper for the Courts below to ignore the Railroad Law of New York State limiting petitioner's obligation toward the superstructure of said bridge to its maintenance and repair? Can liability be imposed upon petitioner, wholly or partly, on the ground that, the State statute to the contrary notwithstanding, it failed to provide guards, human or mechanical, against the public use of the superstructure of the City's bridge as

a highway, playground or hunting preserve? Were these cases properly submitted to the jury on the theory that petitioner's wires, being affixed to the bridge superstructure, were in effect a part of it and, accordingly, it was for the jury to say whether petitioner should have provided guards against the public use of the City's property, when the State statute limited its obligations to maintenance and repair?

Issues.

The cause of action alleged in each complaint herein was based on the attractive nuisance doctrine. Though each complaint contained two counts they were identical in language, except that the second added that the bridge superstructure and defendant's wires constituted a nuisance (transcript of record, folios 26, 214-215).

Both complaints alleged: That on or about June 9, 1916, and other times mentioned, the defendant operated a railroad through the State of Connecticut into the City of New York, and, as a part of said system, built a bridge across its tracks at 149th Street, a public highway in the Borough of the Bronx, and, as a part of said railroad system, bridge and highway, incorporated signal erection or structures, access to which was obtained from the ground by a flight of steps, consisting of trellis work constructed from the ground to said structures (fols. 6, 7, 18, 19, 196, 197, 206, 207).

Defendant's original answer in each case admitted that allegation (fols. 31 to 35, 220 to 224). Before trial defendant moved to amend so as to deny the alleged conclusions: that defendant built the bridge as part of said railroad system; and that, as part of said bridge and public highway, it incorporated certain signal erections and structures, access to which was obtained from the

ground by a flight of steps consisting of trellis work (fols. 228 to 239). At the opening of trial, defendant admitted it constructed the bridge, but denied that the bridge was part of its railroad system, that the signal and other erections were incorporated as part of the bridge, and that access to the latter was obtained from the ground by a flight of steps, consisting of trellis work (fols. 407 to 419, especially 414, 415, 416). The complaint was then amended, upon consent, so as to strike out the aforesaid conclusions (fols. 416 to 419).

The complaint further alleged: That the trellis work was so near the ground that a child could easily ascend it; that such maintenance was in violation of the prevailing practice; that the trellis work was a natural and instinctive lure to children; that defendant did not warn boys going up said trellis work; that the boys climbed it and defendant knew or should have known it; that defendant maintained a highly charged electric cable in and about the bridge, which could be reached by a child via the trellis work; that on or about June 9, 1916, the cable was not properly insulated and protected; that on or about said date, David Fruchter, while playing with other boys on said bridge climbed the trellis work, came in contact with the electric cable, receiving the injuries complained of, by reason of the defendant's negligence in maintaining the trellis work, as aforesaid, in failing to warn or prevent boys from so climbing, and in failing to insulate and protect said cable (fols. 5 to 15, 16 to 27, 194 to 204, 205 to 215).

These allegations were all denied by defendant's answer, which further alleges that the accident was caused solely by the contributory negligence, in each case, of David Fruchter or his parents (fols. 32 to 37, 220 to 226).

The plaintiff's bill of particulars charged defendant with neglect in failing to post employes to guard against

boys playing on said bridge and near said cable (fol. 248).

The cases were likewise tried and submitted to the jury on the attractive nuisance doctrine (fols. 844, 903, 930, 1340, 1341).

They were tried and submitted on the theory that, as petitioner's property was affixed to the bridge superstructure, it was a part of the bridge and it was for the jury to say whether petitioner should have provided guards, mechanical or human, to keep boys off the bridge superstructure which belonged to the City, in addition to protecting the wires themselves. The Railroad Law of the State of New York, however, provided that petitioner should merely maintain and repair the superstructure of the City's bridge. Petitioner called the attention of the Trial Court to the statute and, although the latter took judicial notice of it (fol. 1277) it was apparently ignored both by the Court in submitting the case to the jury (fols. 1340 to 1342) and by plaintiff's counsel throughout the trial. Under the charge of the Court, it is impossible to determine whether the verdict is predicated on the failure of the defendant to guard the City's bridge or to guard and protect its own wires, or both. Under the New York Railroad Law, however, it was not obliged to do the former.

Facts.

This bridge was constructed in 1908 to carry 149th Street of New York City over the tracks of the Harlem River Branch of petitioner (fols. 934 to 937). Upon its completion it was dedicated to the public. It had been used by the public as a highway for years before the accident and it belonged to the City of New York. It was constructed of steel and of modern design. It was 54 ft. wide, 270 ft. long and its superstructure was 25 ft. high

(fols. 945, 957). Its superstructure was divided into two sections, each end of which was supported by two steep batter posts, 28 ft. long, and difficult of ascent (fols. 947, 948, 958, 961). It had perpendicular and intersecting columns with trellis work thereon designed to steady the bridge under strain, and not as a scaling ladder for public use (fols. 936, 940, 941). Its superstructure was surmounted by horizontal girders or chords, which were 2 ft. high and constituted a dangerous obstacle to a climbing boy eight years old (fol. 945, 1125).

Petitioner's main line tracks running in to the Grand Central Terminal were electrified in 1907, and its Harlem River Branch in 1912 (fols. 1206, 1207). This branch, however, was operated as part of the main line, and was in fact the main line into the Pennsylvania Railroad Station in the Borough of Manhattan (fols. 1017, 1018, 1020 to 1023). It was a high tension electrical system carrying 11,000 volts (fol. 1207). Immediately upon the completion of the electrification of the latter, in the course of which some of petitioner's propulsion wires were carried over said bridge at right angles to and six feet above it on struts affixed to the top of it (fols. 518, 519, 524, 527, 528, 532, 535, 536, 1221, 1222, 1240, 1241), petitioner installed eight warning signs in the bridge superstructure, four of them being located on the bonnet, or at the base of each strut, affixed to the top of the superstructure and they were there at the time of the accident (fols. 984, 986, 990, 992, 995, 998, 1001, 1002, 1030 to 1033, 1049, 1050, 1054, 1056, 1058, 1059, 1076, 1077, 1102, 1112, 1121, 1133, 1134, 1143, 1147, 1157, 1159, 1160, 1206, 1207, 1260 to 1263).

Both the City's bridge with its superstructure and trellis work and, also, petitioner's strut and wires affixed thereto conformed to engineering standards prevailing

at the time of their construction and of this accident (fols. 581, 935, 936, 940, 941, 949, 1091, 1211, 1212, 1215, 1216, 1265, 1266). Plaintiff made no attempt to dispute this, although the allegations of the complaints were contra.

Petitioner had notice that boys played on the superstructure of the City's bridge, but it had no notice of their ever playing on its own structures affixed thereto. Plaintiff called six boy witnesses, all but two of whom admitted that, over a period of years, they had never climbed petitioner's structures (fols. 685, 686, 696, 700, 720, 721). Those two admitted they were careful to keep beneath the wires (fols. 562 to 565, 667, 668). The ex-police officer, who patrolled that section for years, called by the plaintiff, never saw any boys on petitioner's structure (fols. 502, 562 to 565). Petitioner's employees and other witnesses called by it were not apprised of such use of its own structures (fols. 1075, 1094, 1099, 1100, 1107, 1108, 1113, 1115, 1122 to 1124, 1135, 1144, 1149, 1151 to 1154). Plaintiff made no attempt to prove that boys had ever been on petitioner's property as distinguished from that of the City. On cross-examination of two of plaintiff's boy witnesses they stated that they had climbed part way up petitioner's structures, but of this petitioner had no notice. One of petitioner's witnesses said he knew the boys would be burned (fol. 1147), but he had never seen them climb higher than the top of the top girders (fol. 1153). Obviously, he referred to the danger of contact with the wires running lengthwise of the bridge which were lower than the top girder (Please see Plaintiff's Exhibit 1); whereas petitioner's wires ran across the bridge and 6 ft. above it at right angles to it on struts attached to the top of the superstructure (fols. 518, 519, 1215). Ownership of those other wires was not shown, but the record suggests the

possibility that they belonged to the New York Central Railroad. Plaintiff's Exhibit 2 shows the New York Central power-house in the background to the left. Plaintiff's Exhibit 1 shows the other wires extending lengthwise of the bridge toward that power-house. Two of the New York Central employees testified to the location of that power-house (fols. 1154, 1155, 1158, 1159).

Petitioner never consented to or acquiesced in such use of the City's property. The attitude of petitioner and the City was resistant. Eight warning signs were installed on the bridge. In addition, petitioner assigned its employees, for months at a time, to chase boys off this and other bridges in that section, and other employees had warned or chased them off, and in many instances petitioner caused boys to be apprehended and taken home to their parents (fols. 1074, 1075, 1081 to 1084, 1096 to 1098, 1104, 1105, 1125, 1144). Sometimes the boys replied to the warnings with profane language (fol. 1148), but usually they deliberately evaded the municipal and railroad police. This was conceded by practically all of the plaintiff's boy witnesses.

Except for their bearing on the probable conduct of children on the bridge, the acts of those boys were not important. The more important consideration was what, in fact, lured the infant plaintiff to his injury, and whether he was free from contributing fault. He testified, without contradiction, that he had been upon the bridge but once before the accident, and that was on the preceding Sunday (fols. 814 to 817). He did not climb then to the top of the bridge (fols. 821, 822, 839). He saw the signs on the bridge that day and read them: "LIVE WIRES. DANGER" (fols. 826 to 832). In response to leading questions of his counsel on redirect examination he contradicted this (fols. 893, 894). On the day of the accident, June 9, 1916, in company with an-

other boy, whom plaintiff did not call as a witness, he approached the bridge to cross over it on his way to the East River (fols. 793 to 796, 838). Again he saw the same signs on the bridge (fol. 830). On reaching the bridge, his attention was attracted by a bird's nest in its superstructure. To reach it he climbed to the top of the superstructure (fol. 797). On arriving there his attention was attracted by a pigeon (fol. 845) perched on one of defendant's wires 6 feet 6 inches above the top of the superstructure and 19½ inches from the upright (fols. 524, 535, 536). In order to apprehend the pigeon, he climbed the strut and reached out along the cross arm. The pigeon flew away and his hand came in contact with the wire (fols. 797, 800, 808, 864). Before attempting to ascend, he looked to see if there were any signs on the bridge, and he made sure that no men were working on it, and no police officer was near at hand. He stated that if they had been he would not have ascended the structure (fols. 831, 846, 849, 853).

Plaintiff's expert suggested but one protective device, to wit, a metal lattice work affixed to the strut beneath the wires and extending far enough out, in each direction from the upright, as to make it impossible for boys to reach the wires. When petitioner suggested that repair emergencies might necessitate employees reaching the wires, he stated that he would have the device so attached that employees could remove it. This witness apparently did not know the function of the wire in question, and his practical experience had been confined to a trolley system using 600 volts. Apparently his only consideration was the protection of the child, and not the possible inconvenience to petitioner in the performance of its function (fols. 587 to 590, 596 to 599, 603 to 612). Petitioner's experts testified that the suggested device was impracticable in view of the expense, function of the

wires and the necessity in emergency of speedy repair (fols. 1216 to 1220, 1235 to 1237, 1251, 1252, 1256, 1257, 1267, 1268, 1272). Although plaintiff's pleadings charged negligence in failing to insulate the wires, plaintiff introduced no proof that insulation of such high tension wires was practical.

Petitioner's motions to dismiss the complaint made at the close of the plaintiff's case, and for a direction of verdicts in its favor at the close of the entire case were denied and exceptions taken (fols. 904 to 930, 1301 to 1322).

Your petitioner contends that this Honorable Court should grant the writ prayed for and review the following points:

POINT I.

The attractive nuisance doctrine was not applicable to the pleading and proof herein.

(a) Neither the bridge superstructure nor petitioner's structure affixed to the top thereof lured this infant plaintiff to his injury. It was the bird's nest and the bird over which the petitioner had no control. There was a fatal variance between the plaintiff's pleading and his proof. (This point was raised on motions for directed verdicts, fols. 1305, 1306.)

The infant plaintiff repudiated the complaint as follows:

"By the Court:
Q. What did you do at the bridge?
A. I climbed up for a pigeon's nest.
Q. You climbed up to a pigeon's nest?
A. Yes, sir.
Q. Where was the pigeon's nest?
A. Under the——

Q. Well, it was up in the bridge?

A. Yes, sir.

Q. How much climbing did you have to do to get up there? How high did you go?

A. About 25 feet.

Q. How did you get up there?

A. By irons sticking out (fol. 797). * * *

Q. What did you do when you got up to the bridge next?

A. One of the birds were on the wire, and I climbed up the pole, and I was going to grab the bird, but it flew away, and I grabbed the wire.

Q. You grabbed at the bird and it flew away?

A. Yes, sir.

Q. And you grabbed the wire?

A. Yes, sir." (Fols. 800, 808, 864.)

The reasoning of this Court in *Erie* vs. *Hilt*, 247 U. S. 97 is conclusive on this point.

> "There is no ground for the argument that the plaintiff was invited upon the tracks. * * * Temptation is not always invitation. * * * In this case too, the plaintiff was not moved by the temptation, if any, offered by the cars, but by the wish to recover his marble. Therefore, it is unnecessary to consider whether an express invitation would have affected the case, or what conclusion properly could be drawn from the fact that children had played in that neighborhood before and sometimes had been ordered away * * *" (p. 101).

The reasoning in the following cases is squarely in point, *N. Y. C. Co.* vs. *Price*, 159 Fed. 330, at p. 336; *Riedel* vs. *W. J. R. R. Co.*, 177 Fed. 374, at p. 378.

The Court below either totally ignored plaintiff's testimony as to what lured him to his injury, or reached its decision upon the assumption that the bridge superstructure and defendant's structures constituted the attraction, which is contradicted by the plaintiff himself.

Obviously, the question of the lure can not be ignored. Otherwise recovery could be had under this doctrine if the infant was hurled into contact with the wire by some explosive force, or sought the wire to recover his own hat blown there by a capricious wind, or sought it for the avowed purpose of destroying petitioner's property.

(b) The attractive nuisance doctrine declared by this Court in *Railroad* vs. *Stout*, 17 Wall. 657, was not applicable for the essential elements are lacking. (Please see motions to dismiss and for directed verdicts, fols. 904 to 930, 1301 to 1322).

There, the railroad maintained a turntable in an open lot about 80 rods from its depot nearby two traveled roads, one of which passed through the depot grounds. The property on which the turntable stood was not physically separated from adjoining property. Children of the neighborhood had been in the habit of playing on the turntable itself, and this was known by defendant's employees. The turntable equipment was defective, in that the latch which could have held the table in place was broken. The infant there, a child of six years, was playing with other children on the turntable. As a result of the defect, they set it in motion. Defendant acquiesced in such use of its property. It failed to forbid it, or to make any effort to stop it. Defendant's counsel there disclaimed that the negligence of the infant or his parents contributed in any way to the accident.

In holding that the question of liability was for the jury, this Court said: "This disclaimer ought to dispose of the question of the plaintiff's negligence, whether made in a direct form, or indirectly under the allegation that the plaintiff was a trespasser upon the railroad

premises, and therefore cannot recover". Discussing the question of negligence this Court said: "To express it affirmatively, if from the evidence given it might justly be inferred by the jury that the defendant, in the construction, location, management or condition of its machine had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow, the jury was at liberty to find for the plaintiff. That the turntable was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff." Referring to the probability of boys using the turntable, this Court said: "So in looking at the remoteness of the machine from inhabited dwellings, when it was proved to the jury that several boys from the hamlet were at play there on this occasion, and that they had been at play upon the turntable on other occasions, and within the observation and to the knowledge of the employees of the defendant, the jury were justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case. As it was in fact, on this occasion, so it was to be expected that the amusement of the boys would have been found in turning this table while they were on it or about it." Referring to defendant's opportunity to prevent such an accident and its negligence in not doing so, this Court said: "This could certainly have been prevented by locking the turntable when not in use by the Company. It was not shown that this would cause any considerable expense or inconvenience to the defendant. It could probably have been prevented by the repair of the broken latch. This was a heavy catch which, by dropping into a socket, prevented the revolution of the table. There had been one on this table weighing some eight or ten pounds, but it had been

broken off and had not been replaced. It was proved to have been usual with railroad companies to have upon their turntables a latch or bolt, or some similar instrument. * * * The evidence is not strong and the negligence is slight, but we are not able to say that there is not evidence sufficient to justify the verdict."

The controlling considerations were apparently these: (1) the attractiveness to children, especially the injured child, of the instrument causing the harm; (2) its accessibility which was both easy and safe; (3) its dangerous nature and its defective maintenance in violation of prevailing practice; (4) the insignificance of the repair, which would have made it safe with but slight expense to the defendant, and without inconvenience to the performance of its function; (5) the habitual enjoyment of it by the children; (6) the acquiescence of the owner and (7) the innocence and lack of negligence of the infant and his parents.

Except the fact that the instrumentality here which caused the burns was necessarily dangerous to those who came in contact with it, every one of the considerations in that case is absent here. If the evidence of negligence there was slight and barely enough to go to the jury, *a fortiori*, there is none here.

In *U. P. R. R.* vs. *McDonald*, 152 U. S. 262, the same considerations mentioned by this Court in the *Stout* case were present, except that the instrument which caused the injury was not the thing which attracted the child to the premises, and in addition there were affirmative acts of negligence on defendant's part. The coal mine, however, which together with its operation attracted the child and the public, was adjacent to the slack pit which caused the injury, beside which there was a path commonly used by the public with no protection to prevent anyone from falling therein. The molten mass of slack

was not a safe distance from the alluring equipment or the way of approach thereto. In the instant case, the wire was a safe distance above the top of the superstructure of the City bridge and far above the highway, its access therefrom being highly dangerous. Concededly, it was not at a safe distance from the pigeon which lured the child to his injury, but petitioner had no control of that.

If the doctrine is to be applied here, there is no reason why it should not be applied to every elevated railroad structure, to every telephone, telegraph and electric light pole, to every electrical strut on the right of way of railroads employing a system similar to the petitioner's, to every fence, tree, building or other structure within the reach of lawless or venturesome boys. Such an extension of the law will revolutionize the obligations of property owners. It will place an intolerable burden upon commerce and industry. On petitioner's system alone, there are 2,000 struts which come within its purview (fols. 1223, 1224). That the law would compel it to so protect such wires, and provide such guards, mechanical or human, as to make the wires safe and the struts unscalable for lawless children, is unthinkable. Such a principle would exact from individuals engaged in commerce and industry, who lawfully maintain upon their premises, pursuant to prevailing practice, without any defect and at a safe distance from adjoining properties, public and private, instrumentalities which, of necessity contain within them harmful possibilities to those who come in contact with them, the obligation which belongs to the parent.

(c) The Courts below were bound, at least by comity, to follow the highest Court of the State of New York,

which had so steadfastly rejected the attractive nuisance doctrine that that had become a fixed rule of property and action. The property involved here was not mobile but a fixture in the State.

This error was raised by motions addressed to the Court. At the close of plaintiff's case on the motion to dismiss (fols. 904 to 930) petitioner cited *Walsh* vs. *Fitchburg R. R.*, 145 N. Y. 301. The following then took place:

> "The Court: Before you go into that, you admit that this would be a question of general jurisprudence, wouldn't it?
>
> Mr. Carpenter: No, I do not". (fol. 906).

Also, please see the motion for a directed verdict (fols. 1301 to 1322).

There is no doubt that the Court of last resort in New York State has steadfastly rejected that doctrine (*McAlpin* vs. *Powell*, 70 N. Y. 126, 135; *Walsh* vs. *Fitchburg R. R.*, 145 N. Y. 301). The last case has been repeatedly cited with approval. (*Birch* vs. *City of New York*, 190 N. Y. 397, at p. 404; *Johnson* vs. *City of New York*, 208 N. Y. 77, at p. 83; *Vaughn* vs. *T. D. Co.*, 222 N. Y. 79, at p. 83, followed in fact in *Freeman* vs. *B. H. R R. Co.*, 54 App. Div. 596). *Robertson* vs. *Rockland Co.*, 187 App. Div. 720 was decided on the ground that the structure was located on the public highway itself where the public had a right to be, adjacent to the school ground and was maintained in violation of the prevailing practice in that the cleats on the pole unnecessarily extended from the ground up (at pp. 727, 728, 731).

This point raises the question whether the highest court of the state can establish a local rule fixing the obligation of the owner or possessor of real and other immobile property located in the state. The question is not one of mere conduct, a matter of general law. It relates solely to the obligation of the possessor of purely

local property. "There should be, in all matters of a local nature, but one law within the state; and that law is not what this court might determine, but what the Supreme Court of the State has determined" (*Detroit* vs. *Osborne*, 135 U. S. 492, at p. 498). The court below misapprehended the decision of this Court in *B. & O. R. R.* vs. *Baugh*, 149 U. S. 368, for that involved merely a question of conduct: "The single question presented for our determination is, whether the engineer and fireman of this locomotive, running alone and without any train attached were fellow servants of the company, so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former" (p. 370). In *Burgess* vs. *Seligman*, 107 U. S. 20, at p. 33, this Court said: "Since the ordinary administration of the law is carried on by state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and construction of state constitutions and statutes." In the instant case, the property in question, if not realty, was in fact a fixture, immobile and local. In *Swift* vs. *Tyson*, 41 U. S. 16 Pet. 1, at p. 18, this Court said: "In all the various cases which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the 34th section limited its application to state laws strictly of local, that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals and *to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character*". (*The italics are ours*). Petitioner's steel strut has been affixed to the

bridge superstructure since 1912 (fols. 1206, 1207, 1215, 1222).

On this point there is a conflict between the Court below and the Circuit Court for the Third Circuit. In *Snare & Triest* vs. *Friedman*, 169 Fed. 1, the Court considered the question whether it was bound to follow the New Jersey State Courts in rejecting the attractive nuisance doctrine. It declared that it would have been bound by the state rule if the latter had been fixed by the decisions of the State Courts, but after reviewing the latter, concluded that there was no fixed rule, and, therefore, it was free to decide the question for itself. Do not national interests require the affirmation of the principle declared by the Third Circuit?

If the decision of the Court below prevails, it will, in a large measure, destroy a long established rule of property and action not only of New York but of Connecticut. (*Fitzmaurice* vs. *The Conn. Rwy. Co.*, 78 Conn. 406; *Wilmot* vs. *McPadden*, 79 Conn. 367; *Pastorello* vs. *Stone*, 89 Conn. 286).

(d) The doctrine in question was not applicable to this case for the cause of action as alleged, tried and submitted to the jury was on the theory that petitioner's structures, being affixed to the City's bridge were a part of it, and petitioner was obliged to guard the City's property to prevent its being used as an approach to petitioner's property, whereas the Railroad Law of New York limited petitioner's obligation toward the superstructure to maintenance and repair (please see exception to denial of motion for directed verdict, fols. 1301 to 1322).

That the case was tried on this theory is not open to a difference of opinion (please see the complaint and questions of plaintiff's counsel, which uniformly failed to

differentiate between the property of the City and that of petitioner). The charge of the Court was as follows:

> "Now, if you believe, from the evidence in this case, that the defendant company constructed or permitted to exist a trellis under this bridge which was capable of enticing children of immature ages, and that children of immature ages did use it, and did ascend up into the superstructure of this bridge, and if you believe from the evidence under all the circumstances that that was a dangerous thing and it was not the exercise of reasonable care and caution upon the part of the company to permit it; and if you believe further in that connection, that the defendant company knew of the use that was being made by children of immature ages, indiscreet children, children not capable of appreciating danger, and they permitted it, and still allowed it and did not adopt what ordinarily reasonable and prudent persons or companies would adopt to prevent it, and that as a consequence of that negligence, if it was negligence, this boy, the plaintiff, received his injuries, then you should find for the plaintiff" (fols. 1340 to 1342).

Section 93 of the Railroad Law of New York in effect at the time of the accident read as follows:

> "Where a highway crosses a railroad by an overhead bridge, the framework of the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the roadway thereover and the approaches thereto shall be maintained and kept in repair by the municipality."

The Trial Court took judicial notice of it (fol. 1277).

In view of that statute the obligation of guarding the City's property could not be imposed on petitioner. It refers only to maintenance and repair as a bridge structure, and not as a pleasure resort (*City of Yonkers* vs. *N. Y. Cent. R. R.*, 165 N. Y. 142; *In re N. Y. Cent.*, 168

App. Div. 6, Affd. 216 N. Y. 722; *Town of Cortland* vs. *N. Y. Cent.*, 175 App. Div. 194, Affd. 220 N. Y. 598; *Murphy* vs. *D. & H. Co.*, 151 App. Div. 351).

Considering the theory on which the cases were tried and submitted to the jury, no one can say but that the verdicts herein were based, wholly or partly, on the alleged failure of petitioner to guard the City's structure, an obligation not imposed by law. The Court below overlooked this.

POINT II.

There was no evidence of negligence supporting the specific allegations of the pleadings, or if there was a bare scintilla the causal connection was severed by the plaintiff's deliberate, furtive, hazardous and lawless invasion of petitioner's premises.

Plaintiff alleged petitioner's failure to insulate. He did not call a witness to prove it. His own electrical expert did not hazard the suggestion that insulation of these high tension wires with their 11,000 volts was feasible (fols. 587 to 590). The Trial Court apparently appreciated that the witness was not considering the function of the wires (fol. 593), but nevertheless failed to strike out his conclusion that the maintenance was unsafe (fols. 596, 597). His practical experience with propulsion wires had been limited to 600 volts (fol. 604). Nor did he consider the various functions which the wires affixed to the bottom cross arm of the strut in question performed. Obviously, the subject of insulation demanded the knowledge and experience of experts. A jury could not infer either the necessity for insulation, or the possibility of

its use in connection with such high tension wires, or the practicability of it in view of their various functions. There were three wires on the cross arm in question (fol. 521). Four feet and one half above that group, on another cross arm, were two more wires (fol. 522), and above them was a ground wire (fol. 523). One of the bottom wires was used as a feeder for propulsion of trains, one for operating a circuit breaker, and the third furnished current for light (fols. 526 to 529). As one climbed up the strut, the first wire was a power wire, known as a three-phase wire (fol. 532). Whether the insulation of such wires, considering their power and their various functions, was possible and praticable was not shown.

Plaintiff alleged negligence for failure to provide guards, mechanical or human, for prevention of contact with the wires. Plaintiff's expert testified, over petitioner's objection, that the place was unsafe, for the sole reason that children could climb up there and touch the wires (fols. 587, 588, 611, 612). But it would be equally dangerous, from that standpoint, if on a pole 500 feet high. He suggested but one device—the installation of an iron lattice work beneath the wires "so that a boy getting on top of the bridge could not, even though he tried, touch these wires" (fols. 619, 620). But there was no evidence that such a device was practicable, considering the wires, their voltage, function and the necessity of quick repair so as not to interfere with main line transportation where modern conditions require high speed and uninterrupted service.

So far as the failure to maintain human guards is concerned, the Railroad Law of New York did not require it. In fact, petitioner had frequently driven boys off the bridge, and even caused them to be apprehended and taken home to their parents (fols. 1082, 1083). If, in spite

of that, boys frequently played on this bridge and if that is evidence that the guard was inadequate, it is likewise evidence that the boys were defiant and lawless. On this feature alone are the Stout and MacDonald cases analogous? There, the things causing the injury were on the ground, adjacent to the highway. Children played upon or about them without protest. There was no physical separation from adjacent property. Access was without hazard, and the use by the public was so notorious that the infants might have reasonably concluded that consent had been given. This plaintiff, however, knew he had no right there. Before undertaking his perilous climb he made sure that no policemen or railroad employees were near at hand (fols. 831, 846, 849, 853).

POINT III.

The comment of the Trial Court that petitioner's agents were unfair in securing a statement from the infant plaintiff while in the hospital constituted a harmful error.

This comment was as follows:

> "Will you undertake to offer in this case anything that this child said under such an examination as that" (fol. 873).
>
> "I won't say really what I think of such an examination, but go on with your examination" (fol. 875).

The Circuit Court found that it was error but harmless on the ground that it merely tended to aggravate the damages, whereas, the size of the verdict indicated it had no such effect.

Presumptively an error is harmful, and we submit no one can say that the remark did not engender such hostility as to destroy petitioner's chances of a verdict in its favor.

Respectfully submitted,

JAMES W. CARPENTER,

Attorney for Petitioner.

MAR 26 1921
JAMES D. MAHER,
CLERK

Supreme Court of the United States

October Term, 1920

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

Petitioner

against

DAVID FRUCHTER, an infant, by JENNY FRUCHTER, his Guardian *ad litem*

Respondent

No. 7[redacted]2[redacted]

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

Petitioner

against

SAM FRUCHTER

Respondent

No. 7[redacted]2[redacted]36

Brief in Opposition to Petition for Writ of Certiorari

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Supreme Court of the United States

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,

against

DAVID FRUCHTER, an infant by JENNY FRUCHTER, his Guardian *ad litem*,
Respondent.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,

against

SAM FRUCHTER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Facts.

This brief is filed in opposition to an application for the issuance of a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review the unanimous affirmance by that Court of judgments in the amount of eleven thousand dollars ($11,000) in favor of the plaintiffs in an accident case involving the so-called attractive nuisance doctrine.

While in the main, the statement of facts con-

tained in the petitioner's brief is accurate, there are certain important respects in which the statement is inaccurate, and no reference whatsoever is made to some of the most significant testimony in the case.

The bridge upon which the infant plaintiff was injured upon coming in contact with the defendant's wires, is, as shown by the photographs which are part of the record, situated in close proximity to the tenement district where the plaintiff lived but immediately surrounded by unimproved and deserted lots. With its steel beams studded with heavy bolts and its many columns of open trellis work, this bridge provided a tempting allurement for all the small boys in the neighborhood. The broad girders or batter posts which are studded with bolts as shown in the front of Plaintiff's Exhibit I, are set in an angle of about fifty degrees (fol. 947) and several of the witnesses testified that it was a very easy matter to climb up the batter post or to climb up the trellis work (fols. 543-4, 664, 691). The statement in the petitioner's brief (p. 17) that these batter posts "were difficult of ascent" is contrary to the fact and to the testimony which was accepted by the jury.

The testimony is overwhelming and uncontradicted to the effect that for many years prior to the accident to the infant plaintiff, crowds of boys from the nearby tenement district played about the bridge, climbed up on the trellis work and on the broad batter posts and ran helter-skelter over all parts of the bridge, including the top, playing tag, follow the master and other childish games, and searching for birds' nests and eggs.

It is insisted by the petitioner in its brief (pp. 18-19) that there is no proof in the record that the boys ever played upon the strut containing the live wires, or that the agents and employees of

the railroad ever had any notice of the fact that the boys played upon this strut, which was the property of the railroad, as distinct from the bridge which was admittedly the property of the City of New York. This claim is not sustained by the record, as there is ample proof not only that other boys on other occasions had played upon this very strut from which the defendant's live wires were suspended, but that the defendant had notice of the danger to the boys from these very wires.

One of the many boys who had frequently played about this bridge and the strut was Joseph Atrazzo. This boy was called at the trial as a witness for the plaintiff and on his cross examination, he gave the following testimony (fols. 562-3):

"Q. You never came in contact with the wires in any way did you? A. No, sir.

"Q. You never when you got on top of the bridge, you never climbed the superstructure? A. I don't know what you mean.

"Q. You never climbed up to any of the wires, did you? A. I did not climb up the full length.

"Q. And you did take care?

"Mr. Curtis: I object to that as a conclusion.

"Q. Did you take care to keep away from the wires when you went up there? A. No, sir.

"Q. Did you touch them? A. No, sir. I never touched them. *I only climbed up that way.*

"Q. You did not touch them but you did not take any care about it? A. I did not try to touch them.

"Q. You did not try to touch them? A. No, sir.

"Q. How near to the wires did you come when you went up the superstructure? A. About this. Part way.

"Mr. Carpenter: Indicating how much, Mr. Foreman.

"Mr. Foreman: About eighteen inches.

"Q. That was the nearest you ever came to them? A. Yes, sir.

"Q. And how many times did you go up the superstructure? A. I cannot remember.

"Q. About? A. About five times."

Such was also the testimony of Leon Posner (fols. 693-7), and Max Glasser (fol. 723).

The defendant's witness, Antonio Posci, a patrolman in the employ of the defendant admitted that he had seen the boys playing around the wires and that when he saw them playing about the wires as distinct from playing about the bridge, he reported the matter in writing to his superiors (fol. 1089). The defendant's witness, James J. Byrnes, also an employee of the defendant, saw the children playing and climbing so near the wires that "he knew they were going to get burned" (fol. 1147). The claim is asserted in the petitioner's brief that the statement of Byrnes to the effect that he knew the boys were going to get burned had reference to the danger of contact with certain wires running lengthwise to the bridge. A reading of the complete testimony of Byrnes which appears at folios 1145 and 1153 of the record, and which is only three pages in length, will show very plainly that he was thinking of the superstructure of the bridge and the strut from which the very wires upon which the infant plaintiff was burned was suspended, and that he had not the slightest intention of referring to the wires which extended lengthwise to the bridge, which had no connection whatsoever with the controversy.

This witness testified (fol. 1147):

"At the time of this accident, the morning after, when I heard of the accident, I noticed boys would be walking along, and would begin to climb up on top of the lattice work, and I knew they were going to get burned, and I looked up there to see, and the signs were always in place."

He also testified (fol. 1149):

"Q. Indicate the highest part on this picture, which you have seen the boys up on ? A. These boys were playing in and around this lattice work, and up on top of the structure, even here (indicating), running around over there, playing tag, and sliding around on this side (indicating)."

There is not a word in the testimony of the witness Byrnes to the effect that he even knew there were wires running along the side of the bridge near the roadway.

The defendant's witness Posci also gave the following significant testimony (fol. 1088):

"Q. And did you ever report to your superiors that little fellows were climbing this bridge? A. Yes, sir.

"Q. You are sure you did? A. Positively.

"Q. How many times? Many times? A. Yes, sir. * * *

"Q. Did you make those reports orally or in writing? A. *Well, in the case of the wires, I make it in writing,* in the case of taking the boy home, I explained the matter to the captain."

There was accordingly ample evidence in the record to justify the following statement of the facts given in the opinion of the Circuit Court of Appeals herein:

> "There was evidence that for a long time before this accident, boys had been in the habit of climbing to the top of the bridge, that they had been ordered away by policemen and workmen because of the danger *not only of climbing to such a height, but of the known danger arising from the Railroad Company's wires on top of the bridge structure.*" (Italics ours.)

The petitioner's brief (p. 19) lays emphasis upon the alleged fact that there were signs on the bridge, calling attention to the fact that there were live wires on the strut, and that the infant plaintiff read these signs and understood them. In view of the explicit testimony by the infant plaintiff that at the time of the accident, he could not read (fols. 827, 893), and that he did not understand anything about the wires (fol. 809); and in view of the repeated testimony given on behalf of the plaintiffs that at the time of the accident, there were no such signs on the bridge (fols. 467-8, 481, 835-6), it would seem that this issue is entirely concluded by the verdict of the jury. Certainly, the defendant is not now in a position to raise the point that the jury's verdict in this respect is against the weight of the evidence. In this connection, it is important to bear in mind that the photographs which show the signs on top of the bridge were concededly taken after the accident and at a time when the plaintiffs admit that the signs had been put up (fols. 968, 974, 481).

The petitioner has throughout its brief sought to give the impression that if these judgments are sustained, the defendant will be compelled to go to enormous expense in the making of changes in its electrical equipment throughout its entire

right of way so as to avoid injuries to children in the future. We wish to respectfully submit at the outset, however, that the case presents no such issue. The question is not as to whether the defendant should make changes in all the two thousand struts along its line of railroad to which high power electric wires are attached, but rather, whether under the peculiar circumstances of this case, and the fact that large numbers of children of tender age had for years been accustomed to make a playground of this bridge and the superstructure, of all of which the defendant had ample notice, raises a question of fact to be properly submitted to a jury as to whether the defendant had discharged its duty in respect *to this particular bridge*.

POINT I.

It is well settled, that the question of liability for negligence when not modified or regulated by statute, is one of general common law, and the Federal Court is not bound to follow the decisions of the State Court. Furthermore, the New York decisions sustain the judgments in these cases.

It would appear to be abundantly plain that the question of liability for negligence which is the basis of these cases is a question of general common law, which under a long line of decisions both by this Court and by the various Circuit Courts of Appeals has for almost a century been regarded as a subject upon which the Federal Courts are entitled, and, indeed, are in duty bound, to formulate their own opinions irrespective of decisions of

State tribunals thereon (*Union Pacific, etc., Co.*, v. *McDonald*, 152 U. S., 262; *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S., 368; *Southern Pacific* v. *Jensen*, 244 U. S., 249; *Swift* v. *Tyson*, 16 Peters, 1; *Gardiner* v. *Michigan Central Railroad Co.*, 150 U. S., 349; *Chesko et al.* v. *Delaware & Hudson Co.*, 218 Fed., 804).

The contention of the petitioner that the decision of the Circuit Court of Appeals of the Second Circuit in this case is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Snare & Triest Co.* v. *Friedman*, 169 Fed., 1, is wholly without foundation. That there is no inconsistency between these decisions is quite apparent from the fact that although the Court of Errors and Appeals of the State of New Jersey had established a contrary rule on the same identical facts the Circuit Court of Appeals of the Third Circuit refused to follow the ruling of the State Court in the *Snare & Triest Company case.*

The petitioner seeks to bring itself within the rule that the Federal Court will follow the State Court in reference to rulings which in effect relate to rights and title to things having a permanent locality, such as rights and title to real estate, by contending that the strut and wires in the present case have a fixed location on top of this bridge, and that the Court is for that reason making a ruling which in effect creates or affects property rights.

The gist of the case is the charge of negligence which is at the foundation of all cases coming under the so-called attractive nuisance doctrine. This subject has nothing whatever to do with titles to real estate or with any rules of law which

may be directly or indirectly considered to create or affect property rights.

The underlying question is whether under the peculiar circumstances of the case, the defendant is charged by law with the duty to insulate or otherwise protect its wires so that children of tender years may not suffer injury thereby. This is a question of general common law, not a question of property rights, and it is small wonder that the Circuit Court of Appeals of the Second Circuit in this case found difficulty in taking seriously the claim of the petitioner that the Federal Court was not entitled to form its own independent judgment with respect to the rule of law applicable to the case.

Moreover, even if it be assumed that the subject is one upon which the Federal Court should, by reason of comity, bow to a long line of settled and unbroken authority in the State Court, there is no such uniform and well settled line of decisions in New York on the question raised in the case at bar. On the contrary, the New York decisions uphold the recovery by the plaintiff in this case.

It is true that the New York Court of Appeals has in effect held that the so-called turntable doctrine was not applicable to a railroad maintaining a turntable on *strictly private property* (*Walsh* v. *Fitchburgh Railroad Co.*, 145 N. Y., 301).

It was conceded, however, in *Johnson* v. *City of New York*, 208 N. Y., 77, that the rule of the Walsh case was not applicable to a similar situation in a *public street*, and in *Robertson* v. *Light & Power Co.*, 187 App. Div., 720, on facts all but identical with those of the present case, a child was permitted to recover damages sustained as a result of an electric shock received by the child

after it had climbed to the top of a high pole in a public street from which live wires were suspended. As stated by the Court in that case (p. 728):

> "Counsel for the Power Company relies on *Walsh* v. *Fitchburg Railroad Co.*, (145 N. Y., 301), as holding that in this state there is no liability to a trespasser for the maintenance on one's own land of a so-called nuisance attractive to children, such as a turntable, and he argues that the pole was on the private property of his client, and that, therefore, the plaintiff in climbing the pole was a trespasser, and that doctrine exonerates the Power Company from liability. *I think there is a material difference between trespassing upon private premises and using private property left unguarded or unattended either temporarily or permanently in the public highway.* (See *McAlpin* v. *Powell*, 70 N. Y., 126; *Beck* v. *Carter*, 68 *id.*, 283); and the Court of Appeals has distinctly recognized that the turntable doctrine has not yet been extended to a dangerous appliance in, or a dangerous condition created in, a public street. (See *Johnson* v. *City of New York, supra.*)"

This is the latest expression of the New York Courts as to the law of that State in the case like the one at bar. There is no decision of the Court of Appeals to the contrary.

As the accident occurred in the State of New York, the law of Connecticut is not involved, and the decisions of the Connecticut Courts cited by the petitioner (petitioner's brief, p. 29), have no bearing on the case.

POINT II.

The defendant was under a legal duty to take reasonable steps to guard against injuries to children of tender years which were not unlikely to occur because of the close proximity of the live wire to a place and structure about which, well known to the defendant, young children were in the habit of playing.

As far as the so-called attractive nuisance doctrine is concerned, there is nothing new or unusual about the present case, which in no sense calls for an extension of the doctrine as asserted and repeatedly reaffirmed by the Federal Courts.

The evidence overwhelmingly establishes the fact that the bridge with its superstructure, and the struts from which the defendant's wires were suspended, have, for years, lured large numbers of children from the nearby tenement district; that these children habitually played childish games and indulged in childish sports in and about all parts of the bridge, superstructure and struts, and that the defendant's employes, workmen, foremen and bosses knew that the place was being used by children for this purpose, and they even expressed their belief that injury to the children from these live wires was inevitable, unless something were done to protect them.

The case comes directly within the scope of the principles announced by this court in *Railroad Co.* v. *Stout*, 17 Wall., 657, and followed and re-affirmed in the following Federal cases among many others:

Union Pacific R. R. Co. v. *McDonald*, 152 U. S., 262;

United Zinc & Chemical Co. v. *Britt*, 264 Fed., 785;
Chesko, et al. v. *Delaware & Hudson Co.*, 218 Fed., 804;
Coeur d'Alene Lumber Co. v. *Thompson*, 215 Fed., 8;
Hardy v. *Missouri Pacific R. R. Co.*, 266 Fed., 860.

The petitioner lays great emphasis upon the fact that the wires were not alluring in themselves, and that the infant plaintiff was at the moment reaching to catch hold of a pigeon. This circumstance does not render the so-called attractive nuisance doctrine any the less applicable to the case. It should be remembered that the basis of the defendant's liability is negligence. The negligence consists of a failure to take reasonable precautions to avoid injuries to children of tender years, not unlikely to result because of the maintenance of the dangerous thing or situation at a place where the defendant knew or should have known children were likely to be. The probability of the child's coming in contact with the danger may be based upon the alluring character of the dangerous thing, or upon its close proximity to a place or thing alluring to children or upon its close proximity to a place where the defendant knows children are in the habit of playing.

The defendant lays great stress upon the infant plaintiff's testimony of pigeons' nests and pigeons. As a matter of fact, the evidence shows that the primary attraction was the bridge with its beams and trellis work on which the children were accustomed to play follow the master, tag and other childish games. The point is not material, however, as it makes no difference that the plaintiff

may have been partly motivated by the desire to search for pigeons' nests in the framework of the bridge. The evidence is uncontradicted that defendant knew that children were in the habit of climbing this bridge, whatever may have been their motive, and were therefore likely to come in contact with its wire, and hence, the sole question was whether it was negligent in not anticipating and taking reasonable precautions to prevent the kind of injury which the plaintiff sustained.

In the case of *Electric Light Co.* v. *Healy*, 65 Kan., 798, the facts were strikingly similar to the case at bar. Briefly stated, the facts were that the defendant Power Company was given permission by the city of Kansas City to carry its electric wires on a viaduct constituting a part of one of the streets. This the company did, by stringing them on timbers projecting out of the side of the viaduct or bridge. The sides of the bridge were guarded by a high railing or balustrade several feet high, running, substantially speaking, over the ends of the boards constituting the bridge floor. The electric wires alongside the viaduct were defectively insulated, their insulation covers having rotted away in many places. This fact the company knew. Small boys were in the habit of climbing over the viaduct railing and going dangerously near the electric wires. This fact the company also knew. A boy, about ten years old, climbed over the railing and came in contact with one of the electrically charged wires and was killed. According to the evidence it appeared probable that the moment before he had been standing, or rather, moving about on the projecting ends of the bridge boards or the projecting wire-supports. Suit was brought by his parents

to recover damages for his death. Judgment was rendered in their favor in the Court below and the defendant appealed. The decision of the Court in this case has such an important bearing upon the rights of the plaintiff in the case at bar that the opinion of the Court is here set forth at length. Beginning at page 800, the Court said:

> "The matter principally discussed is the question of the company's liability under the circumstances stated. As to the boy, who was not at the time on the highway proper, but who was engaged in a dangerous sport immediately outside of it, was the Company negligent in maintaining its wires in an uninsulated condition where he was liable to come incontact with them? To our minds there can be no doubt as to the answer. It was liable. To an adult it might not have been. To a small boy in the buoyancy of sport and lacking the intelligence and discretion of older years, it was liable, in view of the fact that it knew that children of this class were in the habit of venturing in dangerous proximity to its negligently kept wires.
>
> "The place where the boy met his death was one of those denominated in the books 'attractive nuisances,' the keepers of which according to those decisions which we regard as the sounder exposition of the law, are liable to one who, without inculpating fault on his part, is injured thereby. *It is true the Company did not maintain the bridge and the railing and the elevation above ground, constituting an attractive climbing-place for boys, and it may be that its wires were not themselves attractive playthings for the boys, but it maintained them in such immediate proximity to that which was attractive as to constitute them an integral part of the whole. It put its wires within the attractive environment. It identified itself in that way with the*

attractive place. If one maintains a dangerous instrumentality on his own premises immediately against the premises of another, and within the sphere of the attractive influence of something on the latter, and a third one, venturing on the latter, is injured by coming in contact with the former, he would seem entitled to a recovery; that is, assuming the necessary knowledge to charge the derelict party. The Electric Company had knowledge in this case. Its counsel attempted to explain that it had not, but it had. We have gone carefully through the evidence, and are convinced. * *

"It is immaterial that the viaduct railing and the elevation above ground may not have been dangerous. They probably were, but for reasons peculiar to themselves. The boy did not come to his death because of dangers incident to the mere act of climbing. *Nor is it material that the Company's wires were not attractive. The attractions of the viaduct railing as a place for sport and the defectively insulated wires as instrumentalities of danger are united together as a whole.* We assume that the City is not liable, but, if it were charged with liability, it would be no answer to it to say that it did not furnish the element of danger. It would be sufficient to reply that it furnished the attraction to entice into danger. When the Company answers that it did not furnish the attraction, it is sufficient to reply that it furnished the danger to combine with the attraction. It could have neutralized the harmful ingredient of attractiveness in the compound by guarding against the danger, and to require it to do so, is not to impose upon it any greater burden than though it were responsible for both the hurtful constituents." (Italics ours.)

In the very recent case of *Ft. Wayne & Northern Indiana Traction Co.* v. *Stark* (1920), 127 N. E., 460, decided by the Appellate Court of Indiana,

the same question was presented. In that case it appeared that the defendant company which was engaged in the business of furnishing, for profit, electricity for lighting and power purposes to the inhabitants of the City of Fort Wayne, had strung one of its wires so that it passed through the branches of a tree located on private property, but very near the street; and at the point where the wire passed through the branches of the tree, the insulation had been, for at least two years prior to the accident, defective. The tree was located in a neighborhood where defendant knew that numerous children were in the habit of congregating and playing. The plaintiff, a child of nine years of age, climbed into the tree, and thus came in contact with the wire and was thereby injured. The trial by jury resulted in a verdict and judgment for the plaintiff. On an appeal by the defendant the Court said (p. 460):

> "The one question involved in this appeal is whether or not the facts, as above stated, show actionable negligence on the part of appellant.
>
> (1) Electricity is a dangerous force, and it is well established that companies engaged in its generation and distribution, while not liable as insurers, to those who may come in contact with current carrying wires, are required to exercise reasonable care to keep such wires safely insulated. *City of Decatur* v. *Eady*, 186 Ind., 205, 115 N. E., 577, L. R. A., 1917; *Denver Consolidated Electric Co.* v. *Simpson*, 21 Colo., 371, 41 Pac., 499, 31 L. R. A., 566.
>
> "(2) It is the contention of appellant that appellee was a trespasser; that the wire in controversy was not a nuisance calculated to

attract small children, and that, therefore, there can be no recovery. In other words, it is appellant's contention that, if it is liable to appellee for the injuries complained of, it must be upon the theory laid down in what is termed the 'turntable cases.' It is not the law, as assumed by appellant, that one who maintains premises on which a dangerous thing is suffered to exist is not liable for injuries thereby resulting to children, unless such instrumentality is what is termed an 'attractive nuisance.' In 1 Thompson Neg., 944, the author in discussing the liability to children of one who suffers a dangerous agency to exist on his premises, correctly states the law as follows:

" 'Although the dangerous thing may not be what is termed an attractive nuisance—that is to say, may not have an especial attraction for children by reason of their childish instincts—yet where it so left exposed that they are likely to come in contact with it, and where their coming in contact with it is obviously dangerous to them, the person so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them from its being so exposed, and is bound to take reasonable pains to guard it so to prevent injury to them' * * *

"It follows that if in the case at bar the improperly insulated wire, constructed, as it was, through the branches of the small tree, was obviously dangerous to persons coming in contact therewith, and if it can be said that appellant should reasonably have anticipated that children in their play would climb into the tree, and thus be exposed to the danger, then appellant would be liable to appellee for the injuries sustained, even though appellee was at the time a trespasser. It is not, therefore, necessary to decide whether appellee was or was not a trespasser at the time he was injured.

"The question presented by this appeal, though one of first impression in this State, has frequently been determined by the courts of appeal in other jurisdictions. The conclusion reached by such courts, which conclusion we approve, is well stated in a valuable text on the law of electricity (Curtis Law of Electricity, Sec 512) in the following language:

" 'An electric company, maintaining a dangerous wire through or near a tree, is bound to anticipate that persons may lawfully climb the tree, and it is required to exercise due care to prevent injury to such persons from its wire. * * * The courts recognize that children are apt to climb trees, and impose upon electric companies the burden of using due care to keep their high tension wires insulated in places where children when climbing a tree, will come in contact with them.'

"We hold that under the facts set forth in appellee's complaint, and as shown by the evidence in this cause, the appellant should have anticipated that children would climb into the tree, through the branches of which it had stretched its wire, and that the maintenance of such fire with defective insulation was a breach of duty for which it was answerable to appellee in damages. *Williams v. Springfield Gas & Electric Co.*, 274 Mo., 1, 202 S. W., 1; *Temple* v. *McComb City Electric Co.*, 89 Miss., 1, 42 South 874, 11 L. R. A. (N. S.), 449, 119 Am. St., Rep.; 698 10 Am. Cas., 924. See also *Thompson* v. *Tilton Electric, etc., Co.*, 77 N. H., 92, 88 Atl., 216."

Other cases in point and reaching the same conclusion are:

Temple v. *McComb City Electric Light & Power Co.* (1907), 89 Miss., I, 42 So., 874;

Daltry v. *Media Electric Light & Heat & Power Co.* (1904), 208 Pa. St., 403, 57 Atl., 833;

Talkington v. *Washington Water Power Co.* (1917), 96 Wash., 386;
Williams v. *Gas & Electric Co.* (1918), 274 Mo., I.

POINT III.

The case is not distinguishable, because the plaintiff's climb up the bridge was "deliberate and lawless," as there is an element of trespass in all cases arising under the so-called attractive nuisance doctrine.

The petitioner lays great emphasis upon the fact that the seven year old plaintiff deliberately and lawlessly made, what is characterized as a hazardous climb to the wires on top of the bridge. This circumstance, however, in no sense exonerates the defendant, as the children protected by the attractive nuisance doctrine are in almost every case concededly trespassers, and the law imposes upon landowners and others maintaining dangerous appliances and instrumentalities, the duty of protecting such infants who, by reason of their ignorance and immaturity, expose themselves to danger.

As stated in the opinion of the Circuit Court of Appeals in the present case:

> "Considering the evidence in this case, we conclude that there was evidence from which the defendant could have foreseen that some boy would in a spirit of bravado do exactly what this boy did, and under the Stout case, just such troublesome boys are entitled to be protected against themselves."

POINT IV.

The railroad's duty in the premises was in no sense diminished by Section 93 of the Railroad Law of New York.

The petitioner urges in its brief (pp. 29 and 30), that inasmuch as Sec. 93 of the Railroad Law of New York imposes upon a Railroad Company the duty of keeping the framework and abutments of its overhead bridges in repair, that this duty is exclusive, and that consequently, and by reason of the said statute, the Railroad is exempt from all other duties toward the public with reference to this bridge.

The plaintiffs in these cases do not contend that the railroad has been delinquent in keeping the framework and abutments of the bridge in repair as required by Sec. 93 of the Railroad Law of New York, but rather that it has failed to comply with a duty which it owed to the plaintiffs to take reasonable precautions with reference to its live wires, so that such injuries as the infant plaintiff suffered might have been avoided. On the subject of the care and maintenance of the wires, Sec. 93 of the Railroad Law is entirely silent.

Furthermore, a mere reading of said Section 93 makes it abundantly plain that the statute was merely intended to declare certain affirmative duties and is in no sense a declaration that the enumerated duties are exclusive and that having complied forthwith, the railroad may entirely disregard duties of every name, nature and description theretofore existing and arising by principles of common law.

Respectfully submitted,

LEON SANDERS,
Attorney for Respondents.

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 237.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Petitioner,*

vs.

DAVID FRUCHTER, AN INFANT, BY JENNIE FRUCHTER, *His Guardian ad Litem.*

No. 238.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Petitioner,*

vs.

SAM FRUCHTER.

PETITIONER'S BRIEF.

JAMES W. CARPENTER,
Attorney for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1921.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Petitioner*,
against
DAVID FRUCHTER, AN INFANT, BY JENNIE FRUCHTER, *His Guardian, ad Litem*, } No. 237.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Petitioner*,
against
SAM FRUCHTER. } No. 238.

PETITIONER'S BRIEF.

I.

ABSTRACT.

The above named suits were brought to this Court on writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit, dated April 16th, 1921 (Transcript of Record, fols. 474, 475, 480, 481).

The suits were commenced in the Supreme Court of the State and County of New York (Transcript of Record, fols. 1, 64), and removed to the United States District Court, Southern District of New York.

The infant's action was brought to recover for personal injuries sustained from contact with defendant's electric wire, maintained, pursuant to standard practice, on its own pole or strut attached to the top of the superstructure of a highway bridge in the City of New York, carrying 149th Street over defendant's right of way. The wire was over 30 feet above the roadway. The infant reached it by climbing up the trellis work of the City bridge to the top girder, and from there ascended defendant's strut, which carried various wires of the defendant used in operating the Harlem River Branch of its railroad running beneath said bridge into New York City. The system was operated by 11,000 volts alternating current. The wires were bare.

The father's action was brought to recover for loss of earnings and medical expenses. The accident occurred June 9th, 1916. The infant was eight years old at the time.

The plaintiff charged the defendant with negligence in maintaining the trellis work of the bridge superstructure so that it resembled a ladder and was attractive to children, in having its bare wires within reach of children from the top of the trellis, and in failing to provide guards or barriers to prevent children from climbing said trellis and coming in contact with the wires.

The cases were tried together before Honorable William B. Sheppard, District Judge, and a jury, in August, 1920. The infant testified that on the day of the accident he climbed the bridge superstructure to reach a bird's nest located at its top. From there, he climbed defendant's strut to seize a pigeon which was perched on one of its wires, shown to be 6 feet 6 inches above the top girder

of the bridge, and 19 inches away from the upright of the strut. The cases were tried on the attractive nuisance doctrine. At the close of the plaintiff's case, defendant moved to dismiss, and at the close of the entire case it moved for a directed verdict on the ground (1) that the Federal court was bound by the New York rule which had rejected that doctrine, and (2) that if the court was bound by the Federal rule, the doctrine did not apply under the conditions shown, especially since the New York Railroad Law prescribed defendant's duty toward the bridge as one of maintenance of its superstructure as such. These motions were denied, exceptions noted and verdicts found for the plaintiff for $10,000, and for Sam Fruchter for $1,000.

Appeals were taken from judgments entered thereon, to the Circuit Court of Appeals for the Second Circuit, and the same were affirmed (N. Y., N. H. & H. R. R. Co. vs. Fruchter, 279 Fed. 419).

QUESTIONS.

(1) Is the attractive nuisance doctrine applicable to this situation: The bridge in question was built in 1908 to carry 149th Street over the Harlem River Branch of the defendant's railroad, which was the main line into Pennsylvania station. It was of standard, modern, steel construction, sustained by its superstructure, comprised of batter posts, beams, chords, uprights, etc. It was 230 feet long, 54 feet wide, 27 feet high, and from the roadway to the top of the bridge was 23 feet. The batter posts formed an angle with the surface of the bridge of fifty degrees and were 28 feet long. The horizontal top girders or

chords were 24 inches high and 27 inches wide. The edges of the steel uprights were connected with a series of steel cross pieces forming a trellis work from the roadway of the bridge to the bottom of the top girder, the object of which was to stiffen the supports and aid in carrying the load. The railroad underneath was electrified in 1912, employing a 11,000 volt alternating current. The wires were carried over the top of and at right angles to the bridge by means of vertical poles or struts. There were four, two at each end of the bridge, attached to the outside longitudinal top girders. On each strut were two cross arms running parallel with the bridge and at right angles to the tracks, the bottom one being 6 feet 6 inches above the top surface of the top girder. The wires were attached to these by porcelain insulators. Those nearest the upright were 19½ inches from it. At the north end, where the accident occurred, there were four wires on the bottom arm and three on the upper. It was conceded that they were beyond plaintiff's reach while on the bridge itself. They were live wires used for propulsion, lighting and patrolling, and were bare. When the branch was electrified in 1912 defendant installed eight signs on the bridge reading:

"LIVE WIRES
DANGER
KEEP OFF."

Four were on the railing at the side of the foot path, facing the same at each end of the bridge. Four were attached to the bottom of the four struts immediately above the top girder of the bridge, facing the respective approaches. Boys of the neighborhood habitually climbed

and played on the bridge superstructure. Only two boys testified they had ever climbed defendant's structures. Defendant had no notice of this, but did know of the use of the City's property, had assigned men for months at a time to chase the boys off, and had on several occasions taken smaller boys home to their parents. The plaintiff did not claim that he was attracted by the bridge trellis or defendant's property, but said that he climbed the former to get a bird's nest, and the latter to apprehend the pigeon, which flew away as his hand touched the wire.

(2) Can negligence be predicated in whole or in part upon the failure of the defendant to guard against the alleged playground use of the superstructure of the City's bridge, since the Railroad Law of New York State requires it to maintain and repair it?

(3) Were the courts below bound, in comity at least, to follow the decisions of the highest court of New York State, which had so steadfastly rejected the doctrine, that the proprietor's non-liability to an infant trespasser had become a fixed rule of property and action, to disturb which would be wrong? As a corollary to this—how is the conflict between the Second and Third Circuit Courts of Appeal to be finally decided?

These questions were raised by the motion for a directed verdict (fols. 434, 435, 436, 438, 441) and also the motion to dismiss, made at the close of the plaintiff's case (fols. 302, 305, 307, 308, 309, 310). See also fol. 426, where the court took judicial notice of Section 93 of the New York Railroad Law.

II.

SPECIFICATION OF ERRORS.

(The numbers correspond to those of the assignments in the transcript of record).

First. The learned Court erred in denying defendant's motion for a non-suit made at the close of plaintiff's case and for a directed verdict in its favor made at the close of the entire case, for the following reasons:

(1) The action was commenced and the trial was had on the so-called attractive nuisance theory on account of an accident occurring within the State of New York, and the learned Court failed to follow and apply the law of said State in respect thereto, as declared by the Court of Appeals of said State, and subsequently confirmed and followed by a long line of State decisions.

(2) The plaintiff was a trespasser, and defendant owed him no duty except to refrain from wilful and wanton negligence, of which there was no evidence.

(3) Even under the attractive nuisance theory of negligence, or any other, the plaintiff failed to prove the cause of action alleged, for the following reasons:

(a) The plaintiff testified, without contradiction, that he was not invited, lured or enticed to his injury by the defendant, but that he deliberately and wilfully climbed up to the scene of the accident knowing that he had no right there and that he was doing wrong.

(b) There was nothing attractive or alluring about the bridge in question or the defendant's wire or strut which supported it, and the plaintiff testified, without contradiction, that neither they nor any of them attracted, enticed or lured him to his injury.

(c) Plaintiff was attracted and lured to the top of the bridge by a bird's nest and to the wire in question, attached to the strut located on top of the bridge, by a bird, over neither of which the defendant had any control.

(d) Neither the top of the bridge nor the wire in question was accessible, as defined in the attractive nuisance doctrine, nor was the plaintiff licensed to be there, expressly or impliedly.

(e) Defendant was not obliged to anticipate and provide for the contingency of the plaintiff or other children climbing to the top of this bridge belonging to the City of New York, and from there to the defendant's wire suspended approximately seven feet above it, the only access to which was via a standard steel strut, attached to the top of said bridge.

(f) Defendant was not required under Section 93 of the Railroad Law, or otherwise, to maintain guards, material or human, so as to prevent the plaintiff or other children from climbing to the top of this bridge belonging to the City of New York.

(g) Defendant was not required to maintain guards, material or human so as to prevent, or to post warning signs so as to warn, plaintiff or other children from climbing up this strut and coming in contact with the wire in question.

(h) Defendant was not negligent in failing to install the device described by the plaintiff's engineer, for it was both inconvenient and impracticable.

(i) In maintaining the wire in question bare and uninsulated, except as against its supporting strut, under these circumstances defendant complied with the standards of practice prevailing under like conditions, and there was no proof to the contrary.

(j) The acts and omissions charged against the defendant were not the sole proximate cause of the accident.

(k) There was no evidence of negligence in defendant's construction of the bridge.

(l) In maintaining warning signs on the bridge and the struts and in assigning men to chase boys off the bridge, defendant more than fulfilled its obligation to the plaintiff and other children (fols. 103 to 106).

III.

ARGUMENT.

These cases were tried on the attractive nuisance doctrine. They do not involve the duty due from the owner of a dangerous instrument, carelessly maintained on the premises of another, to a licensee or even trespasser injured thereon. There the duty is inherent and as between the claimant and respondent the latter has no immunity on account of his ownership or of the unlawfulness of the former's presence. As the duty exists the liability depends on the circumstances without resort to the attractive nuisance doctrine (Temple vs. McComb City Elec. Co., 42 So. 874). This principle is recognized in jurisdictions which reject that doctrine (Nelson, Admr. vs. Branford Water Co., 75 Conn. 548, Braun vs. Buffalo Elec. Co., 200 N. Y. 484, Constantino vs. Watson Contracting Co., 219 N. Y. 443, McCrea vs. Beverly Elec. Co., 104 N. E. 365, Chickering vs. Lincoln Co., 108 Atl. 460, Wittleder vs. Citizens Elec. Co., 47 N. Y. App. Div. 410). Daltry, et al vs. Media Elec. Co., 57 Atl. 833, Fort Wayne Co. vs. Stark,

127 N. E. 460, and Consolidated Elec. Co. vs. Healy, 65 Kan. 798, 70 Pac. 884, fall squarely within this principle, although in the last case especially the court sought to reconcile it with the doctrine. In relying substantially on that case the court below was inadvertently misled (N. Y., N. H. & H. R. R. Co. vs. Fruchter, supra, p. 422).

The instant suits do not fall within the class of cases recognizing liability for dangerous conditions or instrumentalities maintained or left in a public place or adjacent thereto (Snare & Triest vs. Friedman, 169 Fed. 1, Barr vs. Green, 210 N. Y., 252, Jennings vs. Van Schaick, 108 N. Y. 530, Lynch vs. Nurdin, 1 Q. B. 29, 1 Ad. & El. (N. S.) 29, Birge vs. Gardner, 19 Conn. 506, Pierce vs. United Gas Co., 118 Pac. 700); nor within the hidden dangers in private premises, constituting a trap set negligently or intentionally (Phipps vs. Oregon R. R., 161 Fed. 376, Reilly vs. Lissner, 160 Mass. 330, Bird vs. Holbrook, 4 Bing. 628, Townsend vs. Wathan, 9 East 277, 299); nor within the obligation of an owner of premises toward an invitee (Bennett vs. Louisville R. R., 102 U. S. 577, Ansonia vs. Sullivan, 239 Fed. 296). The instant cases raise the question whether defendant had any affirmative obligation to an infant trespasser of tender years, injured by the inherently dangerous instrumentalities, lawfully maintained on its premises, pursuant to standard practice.

There was no conflict of testimony except as to the date of the installation of the four signs on defendant's structures, whether the infant could read the signs, and whether defendant's structures (which complied with standard practice) were safe. Defendant's evidence was so "clearly preponderant" that the entire question is one of law (So. Pac. Co. vs. Poole, 160 U. S. 438, 440).

POINT I.

THE ATTRACTIVE NUISANCE DOCTRINE WAS NOT APPLICABLE, FOR DEFENDANT OWED THE PLAINTIFF NO ACTIVE OR AFFIRMATIVE DUTY. (1) DEFENDANT'S DUTY TO THE PUBLIC IN RELATION TO THE BRIDGE WAS CONFINED BY STATUTE TO MAINTENANCE OF THE BRIDGE SUPERSTRUCTURE AS SUCH, AND NO NEGLIGENCE IN WHOLE OR IN PART COULD BE PREDICATED ON ITS ATTRACTIVENESS TO CHILDREN, (2) THERE WAS NO EXCUSE NOR JUSTIFICATION FOR PLAINTIFF'S TRESPASS ON DEFENDANT'S PROPERTY SINCE (a) IT WAS NOT ATTRACTIVE OR ALLURING TO HIM; THE BIRD ATTRACTED HIM; THE PROPERTY WAS A MERE INCIDENT; (b) THE RELATIVE INACCESSIBILITY OF THE PROPERTY AND THE OBVIOUS DANGER INVOLVED IN SCALING THE INTERVENING BRIDGE SUPERSTRUCTURE WAS NOTICE TO ALL, HAVING THE PHYSICAL CAPACITY TO REACH IT, OF DEFENDANT'S INTENT TO USE AND OCCUPY IT EXCLUSIVELY; (c) THE ATTITUDE OF BOTH THE CITY AND THE DEFENDANT WAS FORCIBLY RESISTANT TO THE PUBLIC USE OF THE RESPECTIVE PROPERTIES AS A PLAY OR HUNTING GROUND; (d) DEFENDANT HAD NO NOTICE OF ANY USE OF ITS PROPERTY BY BOYS. FURTHERMORE, THERE WAS NO PROOF THAT EITHER INSULATION OR THE EVIDENTIAL PROTECTIVE DEVICES WOULD NOT SERIOUSLY INTERFERE WITH THE WIRES' FUNCTIONS IN INTERSTATE COMMERCE.

(1) In playing on the bridge superstructure most of the boys climbed via the trellis (fol. 272). Apparently the plaintiff did likewise (fol. 267).

The alleged attractiveness of the trellis and the duty of the defendant to guard it, were essential parts of the cause of action. Section 93 of the Railroad Law of the State of New York, however, provided:

> "Where a highway crosses a railroad by an overhead bridge, the framework of the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the roadway thereover and the approaches thereto shall be maintained and kept in repair by the municipality having jurisdiction over and in which the same are situated."

The Court took judicial notice of it (fol. 426). The statute obviously defines the whole duty of the railroad company to this bridge superstructure as one of maintenance of it as such superstructure. It has been so construed (City of Yonkers vs. New York Central R. R., 165 N. Y. 142; In re. New York Central, 168 App. Div. 6, Aff'd., 216 N. Y. 722; Town of Cortland vs. New York Central, 175 App. Div. 194, Aff'd., 220 N. Y. 598; Murphy vs. D. & H. Co., 151 App. Div. 351). While those cases do not involve the attractive nuisance doctrine, they construe the statutory duty as one of repair and maintenance and the "purpose of the statute was to insure greater safety at such highway crossings" (City of Yonkers vs. New York Central R. R., supra, p. 145). Having thus defined the purpose of the act and the duty of the railroad in respect to *public* property, the mere circumstance of its attraction cannot enlarge the duty.

(2) (a) The absence of any attraction to the plaintiff, arising from defendant's structure or apparatus is fatal. His pleadings do not allege it, but that the bridge trellis work was the attraction because of its resemblance to a ladder and its proximity to the roadway (fol. 66, 67). Plaintiff impliedly denies that he was attracted by either and asserts that the attraction was the bird's nest, in the bridge superstructure, and the bird, which happened to be perched on defendant's wire affixed to the pole, attached to the top of the bridge (fols. 266, 267). Assuming, for the argument, that the attraction of the bird's nest would not be fatal to the claim that the bridge was attractive within the doctrine, does a similar conclusion follow from the casual and transitory visit of a bird to defendant's wire?

In both the Stout and McDonald cases the attraction was inherent in defendant's premises, the turntable and the coal-mining process, respectively. In Erie R. R. Co. vs. Hilt, 247 U. S. 97, this court held that the argument that the premises attracted the infant had no foundation since he was moved "by the wish to recover his marble." The court below misunderstood that case, although it correctly applied it two years before (National Metal Co. vs. Agostini, 258 Fed. 109).

In the federal courts there has been no departure from this principle prior to the instant cases (Reidel vs. West Jersey R. R., 177 Fed. 374, at p. 378; New York Central R. Co. vs. Price, 159 Fed. 330, at 331, 336).

The great weight of the authority in the state courts recognize it. In Graves vs. Washington Water Power Co., 87 Pac. 956, the infant attracted, as the complaint alleged,

by the nesting birds in the supporting structure of a highway bridge, climbed the lattice work thereof and came in contact with the defendant's electric wires attached to the steel support. The court there said:

> "The things that constituted the attraction which it is claimed drew him to this place were features connected with the river, the bridge and the pigeons, and were matters for the existence of which appellant was not responsible."

In Dickinson McAllister vs. Henrich Jung, 112 Ill. App. 138, a boy climbed defendant's elevated structure, on which its elevated trains were operated by a bare third rail, in the City of Chicago, in quest of a ball, which he believed was on the top thereof. The court said:

> "He went up to look for a ball which he had been told was there. It was not his own, if, indeed, it was there at all. This supposed ball, with perhaps the implied challenge to dare a dangerous venture to obtain it, was the sole attraction * * * He went for his own pleasure, in the hope of acquiring a ball. If the ball was there at all, of which there is no proof, it was not put there by, nor in consequence of any act or omission of the appellant. Nor does it appear that appellant had the slightest reason to suppose the ball would be there in that locality" (p. 145).

Please see Fusselman vs. Yellowstone Valley Land & Irrigation Co., 163 Pac. 473, p. 476, 1st column; Blough vs. Chic. Gr. W. R. Co., 179 N. W. 840; Papich vs. Chic. M. & St. P. Ry. Co., 167 N. W. 686 at 689, 1st column; McDermott vs. Burke, 256 Ill. 401, 406, 407; Kalman vs. Cohen, 203 Ill. App. 597; Colby vs. Chic. Jct. Ry. Co., 216 Ill. App. 315; Meyer vs. Union Light, Heat & Power Co., 151 S. W. 941 at 942, 2nd column; even the turntable must actually attract, Hendricks vs. Kans. So. Ry., 77 So. 130; Taylor vs.

Minneapolis & St. L. R. Co., 163 N. W. 405 at 406; Fincher vs. Chic. R. I. & P. Ry. Co., 78 So. 433; Compton et al. vs. Mo. Pac. Ry. Co., 126 S. W. 821 at 822, 2nd column, and 823; Johnston vs. New Omaha Thompson Houston Elec. Lt. Co., 110 N. W. 711 at 712, 2nd column; Nichol vs. Bell Tel. Co., 109 Atl. 649 at 651, 2nd column; Louisville R. R. Co. vs. Ray, 134 S. W. 858 at 862, 1st column; Texas Ry. Co. vs. Garcia, 216 S. W. 1108 at 1109, 2nd column; Simonton vs. Citizens Elec. Light & Power, et al., 67 S. W. 530 at 531, 2nd column, and 532, 1st column.

(2) (b) In both the Stout and McDonald cases the property of the defendant was on the ground and easily accessible from the adjoining highway or other property, such as the depot to which the public was invited. Here the very nature of the bridge superstructure, and the obvious danger of scaling it, were notice that both the bridge proper and the defendant's property were not intended as a playground. Repeated demonstrations of the possibility of children climbing there could not affect it. Presumably the wires had to be placed within human reach. The difficulty of mounting the top girder, which was 24 inches high and 27 inches wide, from the top of the trellis underneath, is intimated in the testimony of one of the boys (fol. 227). The trial court recognized this feature momentarily (fol. 282).

In Hardy vs. Mo. Pac., 266 Fed. 860, the deceased boy was fatally injured from contact with steam in defendant's conduit, which was 700 feet long, one opening of which was on its property and the other under a street. Into this conduit the defendant discharged steam from its power house boilers. Children played at and in the ends

of the conduit, and three had passed clear through. Holding that no recovery could be had under this doctrine, the court said:

> "We are not here concerned with that class of cases dealing with dangerous agencies or conditions adjoining or near public ways or other private grounds, but with such as are well within private property (p. 861) * * * The danger here consisted of hot water and steam * * * The radius of the danger was obviously limited in area and its duration temporary. It was limited to a place in the conduit several hundred feet from either opening and far from the opening through which this boy entered" (p. 863).

Please see Heller vs. The N. Y., N. H. & H. R. R. Co., 265 Fed. 192 at 199; Sheffield Co. vs. Morton, 49 So. 772 at pp. 775, 776; McAllister vs. Jung, supra, pp. 143, 146; Hageage vs. District of Columbia, 42 App. D. C. 109; McDermott vs. Burke, supra; Colby vs. Chic. Jct. Ry. Co., supra; Fincher vs. Chic. Ry. Co., supra; Mayfield vs. Webb, 111 S. W. 712, 713, 1st column; Coon vs. Kentucky R. R., 173 S. W. 325; Heva vs. Seattle School District No. 1, 188 Pac. 776; Troglia vs. Butte Co., 270 Fed. 75; Polk vs. Laurel Hill, 174 Pac. 414.

In Smalley vs. Rio Grande Western Ry. Co., 98 Pac. 311, holding that the doctrine was not applicable to a railroad yard, the court said:

> "The instrument or agency must not only be dangerous and attractive, but the circumstances of leaving and maintaining it must also be such as to induce young children to believe that they are at liberty to enter and handle or play about it. That is, it must be made to appear, either from the character of the instrument or agency itself, or from the manner and circumstances under which it is maintained or left about the premises, or from other conduct on the part of the

owner or occupant of the premises, that an inducement or its equivalent was held out to young children to enter" (p. 319).

The evidence here shows clearly that the boys, including the plaintiff, knew they had no right on this bridge (fol. 245). In climbing it they evaded the police of both the City and the Railroad. In surmounting the obvious dangers and difficulties of the ascent, the plaintiff's achievement was astounding. The boys knew the wires were there (fols. 229, 233, 240). The plaintiff said he saw and read the signs before the accident (fols. 276 to 280). The redirect examination speaks for itself (fol. 298). The trial court remarked that if the plaintiff had been of such an age as to appreciate the signs he would have been a trespasser (fol. 381). Plaintiff lived in a tenement district of the City of New York, and had been in school for a year and a half (fol. 276).

(2) (c) There were eight signs on the bridge, presumably with the consent of the City, "Live Wires, Danger, Keep Off." The City police officer testified that he could not get near enough to the boys to chase them off (fol. 166). Defendant's witnesses had repeatedly chased the boys off, and men had been assigned for that purpose for months at a time (fols. 361, 369). In the Stout case there was not a scintilla of evidence that the defendant was opposed to the children using its premises, and in the McDonald case "it permitted" it (p. 279).

(2) (d) Only two of the plaintiff's boy-witnesses said they had ever been on defendant's structure. In fact, neither the Court nor plaintiff's counsel made inquiry of

any witness, except the infant plaintiff, as to the boys visiting defendant's property as distinguished from the bridge—although at the opening of the trial, and subsequently, defendant referred to, and distinguished between, the two (fols. 136, 139, 430). The City policeman had never seen any boys there:

> "Q. I am asking you, had you ever seen the boys after they had got up on top of the bridge, climb the superstructure which holds the wires?
> "A. No, I have not seen them up on that" (fol. 168).

This bridge was a part of the post which he patrolled (fol. 150), and for two years prior to the accident he had frequently seen children playing on the bridge (fol. 155). Vogel testified on direct examination that he had been on the bridge ten or fifteen times (fol. 226). On cross examination:

> "Q. When you got up on top of the girders did you climb up into the superstructure that held the wires above the top of the bridge?
> "A. No, sir.
> "Q. You knew the wires were there?
> "A. I knew the wires were there" (fol. 229).

Posner said on direct examination that he had seen lots of boys of different sizes climbing, and playing around the bridge (fol. 230), and on cross examination:

> "Q. If I understand you correctly, you say you never did climb those poles where the wires were?
> "A. I never did climb those poles" (fol. 232).

His previous statement that he climbed up "just underneath the wires" refers to the wires running longitudinally

and at the side of the bridge structure, which were attached thereto by a cross beam:

> "A. There is one beam that the wires are suspended on, and that beam I never climbed up there. * * * But you hold it when you climb up.
> "Q. I can not hear you.
> "A. I climbed up here to the top where it is level (indicating).
> "Q. You went up to the top of the girder?
> "A. Yes, sir.
> "Q. Of the bridge proper?
> "A. Yes, sir" (fol. 232).

The ownership of the wires, here referred to, was not shown, but there is abundant evidence that the power house of the New York Central Railroad was southeast of the bridge (fols. 385, 386, 387).

Neidenburg said on direct examination that he had climbed the bridge about three feet during the year and a half prior to the accident and had seen boys climb many times (fol. 234). Glazer testified on direct examination that he climbed the bridge for two or three years before the accident (fols. 239, 240), and on cross:

> "Q. I am asking you about that part of the steel structure that was above the top of the bridge, did you ever climb up into that?
> "A. No, sir.
> "Q. You knew the wires were there?
> "A. Yes, sir" (fol. 240).

Atrazzo testified that from the top of the bridge he had climbed the superstructure where the wires were about five times (fol. 188). Wohl said that once in a while, when being chased in a game of tag he climbed up the super-

structure above the top of the bridge two or three feet (fol. 223). Referring to the wires, he said: "I did not know whether they were covered or not, so I never went near them" (fol. 223).

The following words are pertinent: "Nothing approaching knowledge by defendant of any passage through the conduit of boys at any time was shown, and such knowledge can not be inferred nor imputed from the three trips in the course of four years shown in the evidence. Such knowledge cannot be founded upon the circumstance that children played about the openings of the conduit. There is no limit, except physical ability, to what a child may do. The law does not require the property owner to guard against any such wide possiblity of action. 'Anticipation,' in the meaning of this doctrine, means probability, not possibility. There must be a reasonable expectation of the presence of children at the time and place of danger before there arises a duty to guard them from that danger. In our judgment, the proof here falls short of this standard" (Hardy vs. Mo. Pac. R. Co., supra, at 863). A fortiori such knowledge cannot be imputed to this defendant from the playground use of the City's bridge.

None of defendant's witnesses had seen boys climb its property. Posci said that he had reported orally to his superiors many times that little fellows climbed the bridge, and that his custom was to make a written report "in the case of the wires" or "in case of an arrest" (fol. 363); but as no arrest was ever made, he made no written report (fol. 364). It should be noted that there was no evidence of any accident prior to this where boys came in

contact with defendant's wires over this bridge (fol. 374). The City police officer referred to a boy coming in contact with the wires under the bridge (fol. 164). Posci's statement about the wires referred to the custom pursued by him and not to any accident involving the wires over this bridge.

The obvious danger, the extraordinary daring of the children and the reaction upon the mind of one witnessing the same, is illustrated in the testimony of McNally, an employee:

> "Q. In the course of patrolling that yard, have you ever seen any boys on that bridge?
>
> "A. Oh, Lord. They gave me more trouble than the men around the yard.
>
> * * * *
>
> "Q. Have you ever had occasion to chase them off?
>
> "A. Oh, Lord, yes. If I see a little tot up there, I would go up and advise him and tell him of the danger.
>
> "Q. Tell us where you have seen them.
>
> "A. All over the bridge. Sometimes the little fellows would get up there, and I would go and chase them off, and tell them, and explain to them how dangerous it was to get around in there, that they might fall down" (fols. 366, 367).

> "Q. I hand you this defendant's exhibit "D" (handing photograph to witness) and ask you to point out what was the greatest height you had ever seen them up on the bridge.
>
> "A. Oh, Lord. I have seen them get up there, to the top, very near right up there.
>
> "Q. Will you show that to the jury, please?
>
> "A. They would climb right up along here (indicating).

"Q. Have you ever seen them on top of these girders?

"A. No, I never saw them up there.

"Q. Not that high?

"A. No, I never saw them up that high, that I remember.

"The Witness: They might have been up there, but I don't remember" (fol. 367).

See National Metal Co. vs. Agostini (supra, p. 111).

The boys' furtive evasion of the police, of both the City and the railroad, and their quondam profane defiance of the efforts of the latter to eject them (fol. 383) established their lawlessness conclusively, precluded the possibility of defendant's resistance becoming the implied acquiescence of the Stout case and barred the imposition upon the defendant of an affirmative duty.

(3) Plaintiff failed to prove that insulation or other protective devices would not interfere with the wires' functions of propulsion, patrol and lighting in interstate commerce. The tracks under the bridge were a part of the main line into Pennsylvania Station, New York City (fol. 340). The complaint and the bill of particulars alleged negligence through the failure of the defendant to insulate (fols. 67, 71, 83). Obviously, that called for expert opinion. Plaintiff called one expert, but not on insulation. He testified over defendant's objection that the place was unsafe because children could climb to the wire (fols. 196, 197, 199). He had had no practical experience with such propulsion problems (fol. 202). He said that an iron screen attached to the strut, extending out in each direction far enough to prevent approach to the

wires, would constitute reasonably safe maintenance (fols. 205, 206). Defendant was not allowed to ask him whether that protective device had ever been adopted in practice (fols. 204, 205, 207), but its experts said it was impracticable and unknown in practice (fols. 406, 407, 423). Screens were used to protect wires underneath bridges (fol. 419), but obviously that would not interfere with the approach from underneath for repair and maintenance. That the instant construction was standard (fols. 405, 406, 422) was uncontradicted.

Speaking of a protective device, this Court said in the Stout case, referring to the accident: "This could certainly have been prevented by locking the turntable when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant." That was a simple device. Here is involved the conduction of a dangerous power at a great height above the tracks for use in carrying on commerce where speed as well as safety is a modern essential. There are two thousand struts on defendant's lines (fol. 417) and seventy-eight bridges between New Haven and New York (fol. 335). The protection of the wires, on all or any of them, against infant trespassers, should not be left to juries, especially without any evidence as to the effect upon their function (So. Pac. Co. vs. Berkshire, 254 U. S. 415, 417).

POINT II.

THE NEW YORK RULE OF NON-LIABILITY TO INFANT TRESPASSERS OR LICENSEES FOR INJURIES RECEIVED FROM INHERENT DANGERS IN PRIVATE PREMISES IS SO THOROUGHLY ESTABLISHED THAT IT HAS BECOME A FIXED RULE OF PROPERTY AND ACTION BY WHICH THE COURTS BELOW WERE BOUND IN COMITY. NATIONAL INTERESTS REQUIRE THE AFFIRMATION OF THE PRINCIPLE DECLARED BY THE THIRD CIRCUIT COURT OF APPEALS.

The strut in question was a fixture carrying the defendant's propulsion and other wires over and along its right of way and across and above the highway. It was as much a part of the railroad premises as the roadbed, tracks and turntables. It was fixed and apparently as permanent as a turntable. The fact that its foundation was the superstructure of the City highway bridge, rather than the earth, the fee of which might or might not have been vested in the defendant, is immaterial. Neither the Stout case nor Walsh vs. Fitchburg R. R., 145 N. Y. 301, emphasizes the classification of the proprietary interest. There is no analogy between the strut and an unenclosed sewer in the process of construction in a city street (Johnson vs. City of N. Y., 208 N. Y. 77), a vehicle left in a public highway (Lynch vs. Nurdin, supra), nor even an electric light pole on the highway (Robertson vs. Rockland Co., 187 N. Y. App. Div. 720). This strut was removed from the highway from which there was no immediate access as in the Robertson case. It was a part of the railroad line beneath.

The question, therefore, whether there was any affirmative duty, does not concern mere conduct, nor even conduct and property, mobile or transitory. While the question of the proprietor's obligation in respect to *fixed* property and action is naturally a matter of general law, its potentiality is local. "In all the various cases which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the 34th section limited its application to state laws strictly of local, that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals and *to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character.*" (Swift vs. Tyson, 41 U. S. 16 Pet. 1, at p. 18. *The italics are ours*). Snare & Triest vs Friedman (supra, pp. 11, 12) holds that the question of the defendant's liability to an infant child injured while playing on some steel beams piled on the sidewalk in an alleged insecure manner would have been determined by the local rule had there been one. Please see Burgess vs. Seligman, 107 U. S. 20; Bucher vs. Cheshire R. R. Co., 125 U. S. 555; Etheridge vs. Sperry, 139 U. S. 267.

The courts below failed to recognize this principle. The circuit court below relied in part on B. & O. R. R. vs. Baugh, 149 U. S. 368. We submit that that case was not in point for "The single question presented for our determination is, whether the engineer and fireman of this locomotive, running alone and without any train attached, were fellow servants of the company, so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former" (p. 370).

The New York turntable case, holding that there was no liability to an infant *licensee* for injuries received from the dangerous condition of the premises, was decided in 1895 (Walsh vs. Fitchburg R. R., supra). It has been cited with approval repeatedly. (Birch vs. City of New York, 190 N. Y. 397, at p. 404; Johnson vs. City of New York, 208 N. Y. 77, at p. 83; Vaughn vs. T. D. Co., 222 N. Y. 79, at p. 83; Barrett vs. B. H. R. R., 188 App. Div. 109, 111, 112; Lande vs. L. & S. Cons. Co., 191 App. Div. 497, 499; Carroll vs. City of Yonkers, 184 N. Y. Supp. 847, at 851). It has been followed in Holmes vs. D. & H. R. R., 128 App. Div. 24, at 26; Kane vs. Erie R. R., 110 App. Div. 7, at 8; Coleman vs. Graves Co., 97 App. Div. 411. The result, in Freeman vs. B. H. R. R., 54 App. Div. 596, is not inconsistent. As the majority of the states have followed the Stout case, the New York rule is a local one, recognized as such not only by the courts of other states, but by many commentators.

We submit there should not be two conflicting rules of property and action in the second circuit—one of liability declared by the federal court, and the other of non-liability declared by the state courts of both New York and Connecticut (Fitzmaurice vs. The Conn. Rwy. Co., 78 Conn. 406; Wilmot vs. McPadden, 79 Conn. 367; Pastorello vs. Stone, 89 Conn. 286), and that in comity the former should bow to the latter.

POINT III.

IF THE DEFENDANT OWED THE INFANT ANY DUTY THERE WAS NO EVIDENCE OF NEGLIGENCE AS APPEARS FROM THE PREVIOUS DISCUSSION OF THE TESTIMONY.

CONCLUSION.

The complaint should have been dismissed or the verdict directed for the defendant.

Respectfully submitted,

JAMES W. CARPENTER,
Attorney for Petitioner.

APR 18 1922
WM. R. STANSBU
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921

No. [redacted]35

THE NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY

Petitioner

v.

DAVID FRUCHTER, an infant, by JENNIE FRUCHTER, his *Guardian ad litem*

Respondent

No. [redacted]36

THE NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY

Petitioner

v.

SAM FRUCHTER

Respondent

Respondents' Brief

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Supreme Court of the United States

OCTOBER TERM, 1921.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Petitioner, *v.* DAVID FRUCHTER, an infant, by JENNIE FRUCHTER, his Guardian *ad litem*, Respondent.	No. 237.
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Petitioner, *v.* SAM FRUCHTER, Respondent.	No. 238.

BRIEF FOR RESPONDENTS.

Statement.

These two actions, brought by father and son, were brought to this Court on writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit (fol. 474), and they are based upon certain personal injuries sustained by the son on June 9th, 1916, as a result of a severe electric shock

from a high-tension feed wire maintained by the petitioner, hereinafter referred to as defendant, on top of a public municipal bridge situated at 149th Street, in the Borough of Bronx, City of New York.

The bridge in question is a public thoroughfare described in the testimony as a municipal bridge freely open to the public without restriction. The exhibits which appear at the end of the transcript of record show more clearly than any written description the appearance and condition of the bridge. Situated in close proximity to the tenement district, where the plaintiffs lived, and immediately surrounded, as the photographs show, by unimproved and deserted lots, this bridge, with its steel beams studded with heavy bolts and its many columns of open trellis work, provided as tempting an allurement as might well be constructed for the small boys and children who naturally seek some playground in the free, open air, as near as might be to their homes.

The only part of this bridge maintained by the defendant is the apparatus on top, to which are attached the wires in question. This apparatus, as appears from the photographs, consists of a post or strut of open trellis work extending about six feet above the top of the bridge proper, and is repeatedly referred to by counsel and the various witnesses as a "superstructure." This strut, with its iron cross-arms and electric wires, was described by the witness Hoge Gilliam, an electrical engineer employed by the defendant, who had been connected with the defendant for thirteen years (fol. 402). He testified that the distance from the top of the bridge to the nearest wire suspended from this apparatus was only a short distance of about six feet (fols. 175, 179). He also

testified that if a person climbed up the strut to the iron cross-arms from which wires were suspended, the first wire such a person would meet, and evidently the one upon which the infant plaintiff was burned, is "a three-phase wire. That is, a power wire, * * * used for furnishing propulsion current to operate the trains" (fol. 178). This wire carried a voltage of approximately eleven thousand (11,000) volts (fol. 403), and the space from the steel strut to the wire is nineteen and one-half inches (fol. 179). The wires as shown by the photographs were attached to porcelain insulators, but it is conceded that the wires were not otherwise insulated or protected.

The testimony of the witnesses produced both by the plaintiffs and by the defendant indicates that for many years prior to the accident to the infant plaintiff, crowds of boys from the nearby tenement district played about the bridge, climbing up on the trellis work and on the broad batter posts and ran helter-skelter over all parts of the bridge, including the top, playing tag, follow-the-master and other childish games and searching for birds' nests and eggs. The testimony of the witnesses for both sides indicates beyond any question that boys on repeated occasions climbed and played not only about the top of the bridge, but into and upon the very strut upon which the defendant's wires were suspended, and where the infant plaintiff was injured.

Among those who had actually climbed upon the strut or superstructure, as it was called in the testimony, are Joseph Atrazzo (fols. 188-9), Leon Posner (fols. 231-2), and Max Glaser (fol. 240). Six of these small boys were called as witnesses by the plaintiffs and they testified that they

had for a long time used the bridge as a playground and that they did not know that the wires suspended from the strut were charged with electricity (fols. 227, 190, 223, 242). The defendant produced as witnesses several patrolmen and other employes in its service at the time of the accident and on cross examination they significantly admitted that they had on many occasions observed the boys using the bridge and the superstructure as a playground and the defendant's witness, James J. Byrnes, even admitted that he saw the children playing and climbing so near the wires that he "knew they were going to get burned" (fols. 383, 384).

The defendant's witness, Edward McNally, employed by the defendant as a patrolman in its Oak Point Yard, which included this bridge itself (fol. 366), testified that he had seen the children climbing around the bridge so many times that he "couldn't remember" (fol. 368), that the "little tots" whom he saw climbing in all parts of the bridge "ranged from five years to seven and eight years old" (fol. 369). He testified that he was afraid the boys would get hurt and that they gave him more trouble than the men around the yard (fols. 369-70).

Another one of the defendant's patrolmen, Antonio Posci, who had been in the employ of the defendant since 1905, observed the boys playing about the bridge on many occasions, but added that they were so small that he did not want to arrest them (fol. 359), that the majority of them were "little fellows" (fol. 361), and that "many a time I took them home to their mothers" (fol. 361). This witness also admitted (fol. 363):

"Q. And did you ever report to your supe-

riors that little fellows were climbing this bridge? A. Yes, sir.

"Q. You are sure you did? A. Positively.

"Q. How many times? Many times? A. Yes, sir. * * *

"Q. Did you make those reports orally or in writing? A. *Well, in the case of the wires, I make it in writing,* in the case of taking the boy home, I explained the matter to the captain."

As to the signs referred to on page 8 of the petitioner's brief, the infant plaintiff gave uncontradicted testimony to the effect that at the time of the accident he could not read (fols. 276, 298), and that he did not understand anything about the wires (fol. 270). Moreover, as to the existence of the signs, the testimony at the trial was clearly conflicting (plaintiff's evidence, fols. 156, 161, 279; defendant's evidence, fols. 329, 344, 352), and the photographs, which show the signs on top of the bridge, were concededly taken after the accident.

There was also ample proof that it was practicable and feasible to construct some mechanical apparatus which would entirely protect the live wires suspended upon these struts and thus avoid injury to the small boys playing about the top of the bridge from injury (fols. 204-5, 416-7).

In view of the very clear and comprehensive statement of facts contained in the opinion of the learned Circuit Court of Appeals herein, the above brief summary of the facts would have been omitted but for the claim asserted on page 9 of the petitioner's brief that the defendant had no notice of the fact that the boys had climbed upon its strut or superstructure, in contradistinction to the

bridge itself, which was owned by the City of New York.

There was ample if not overwhelming evidence to indicate the most complete notice by the defendant not merely of the fact that the boys in great numbers habitually used the bridge as a playground, but also of the fact that upon occasions and not infrequently the boys climbed up upon the very struts from which the live wires of the defendant were suspended.

Outline of Argument.

1. The plaintiffs' position in these cases is that since the live wire from which the infant plaintiff received his injuries was maintained by the defendant over a public highway attached to a municipal bridge, the defendant's liability is governed by those rules of law applicable to persons maintaining a dangerous thing in or adjacent to a public highway.

   (a) Whatever doubts have been cast upon the so-called attractive nuisance doctrine when applied to dangerous things kept upon *strictly private property*, the overwhelming weight of authority supports the application of the doctrine to dangerous instrumentalities maintained in or adjacent to a public highway.

   (b) Defendant's contention that the wire in question was on its own private premises is contrary to the conceded facts as stated in its own brief.

2. Even if it were true, as erroneously asserted by defendant, that the wire was on its own premi-

ses, the plaintiffs are entitled to recover because under the decisions of this Court the so-called attractive nuisance doctrine is nevertheless applicable.

(a) This doctrine, so far as the United States Courts are concerned, is nothing more than a phase of the broader doctrine of negligence and the term "nuisance" is a misnomer.

(b) The immunity accorded by the common law to land owners against liability for injuries negligently caused adult trespassers or infant trespassers of sufficient maturity to appreciate the dangers to which they are exposed is not accorded land owners as against trespassing children of tender years who are lured upon the premises by an attraction visible from the public highway in which children are in the habit of playing. In the latter case the landowner is under a duty to take *reasonable* precautions to avoid *probable* injuries which, in the instant cases, the defendant failed to do.

(c) It is not plaintiffs' contention that defendant is an insurer against injuries caused such children trespassing upon its premises. The defendant's duty to take preventive action is predicated upon *notice* of facts which would warn a reasonable man that such injuries are likely to occur. Furthermore the extent of defendant's duty after notice is not unlimited, but merely requires that such precautions be taken as are *reasonable under the circumstances*. In the instant cases there was evidence that defendant not only had notice

of the danger but that the defendant might by a simple and inexpensive device, which would not interfere with the use of its property, have removed the danger to the infant plaintiff and numerous other children who defendant knew were constantly playing about its live wire. Whether defendant had discharged its duty under the circumstances was a question for the jury and its verdict, which was unanimously affirmed by the Circuit Court of Appeals, is conclusive on this point.

3. The plaintiffs further contend that it was not necessary for them to prove that defendant's wire, as distinguishable from the City's bridge and defendant's strut, was alluring to children. It is sufficient that the defendant maintained a dangerous wire in close proximity to something which was alluring to children or in close proximity to a place where defendant knew, or should have known, children were likely to be. Assuming that the control of the bridge proper was in the City, this did not in any way prevent the defendant from taking reasonable steps to keep children from coming in contact with its wires.

4. Section 93 of the Railroad Law of New York, claimed by defendant to limit its duty to the public with reference to the frame work of the bridge, is inapplicable. Section 93 of the Railroad Law merely deals with the duty of the defendant as to the maintenance of the bridge *per se* and has nothing to do with the duty of the defendant with reference to the maintenance of live wires attached to the bridge.

5. It is well settled that the question of lia-

bility for negligence, if not modified or regulated by statute, is one of general common law and the Federal Court is not bound to follow the decisions of the State Courts. Furthermore the decisions of the New York Courts sustain a recovery by the plaintiffs in the cases at bar in view of the fact that defendant's wire was over a public highway.

ARGUMENT.

FIRST POINT.

The defendant's liability is governed by those rules of law applicable to persons maintaining a dangerous thing in or adjacent to a public highway.

The defendant begins its argument by attempting to distinguish the cases at bar, which defendant states were tried upon the so-called attractive nuisance doctrine, from cases where one is carelessly maintaining a dangerous thing upon the premises of another or in the public highway or adjacent thereto. *In the latter type of case defendant concedes liability for injuries thus caused either a licensee or a trespasser* (Petitioner's brief, p. 12), but defendant states that the instant cases raise the question whether defendant was under any affirmative duty to an infant trespasser of tender years injured by the inherently dangerous instrumentalities maintained on its own premises (Petitioner's brief, p. 13).

It is difficult to understand why defendant should make this statement in view of the facts as set forth on page 6 of its brief, that the infant's action was brought to recover for personal in-

juries sustained from contact with the defendant's electric wire *"attached to the top of the superstructure of a highway bridge in the City of New York, carrying 149th Street over defendant's right of way."* Throughout its brief, defendant refers to this bridge as "The City's property," or "City's Bridge" (See Petitioner's brief, pp. 9-11).

In view of these facts, how is it that these cases "do not involve the duty from the owner of a dangerous instrument, carelessly maintained on the premises of another to a licensee or even trespasser injured thereon"? (Petitioner's brief, p. 12). How is it that "the instant cases do not fall within the class of cases recognizing liability for dangerous conditions or instrumentalities maintained or left in a public place or adjacent thereto"? (Petitioner's brief, p. 13.) Indeed the defendant cites as an example of the type of case in which defendant concedes liability, *Consolidated Electric Light Co.* v. *Healy*, 65 Kan., 798, 70 Pac., 884, where, as in the instant cases, defendant was carelessly maintaining a live wire on a public bridge (Petitioner's brief, pp. 12-13), but defendant suggests that because the cases at bar were tried upon the attractive nuisance doctrine instead of being tried upon some other and more appropriate theory, which defendant does not define, plaintiffs are not entitled to recover.

Just what defendant considers the attractive nuisance doctrine to be is hard to comprehend in view of this subtle distinction which it seeks to draw. It is believed, however, that either the defendant has misconceived the doctrine or else in its attempt to escape the consequences of unfavorable decisions, it has unwittingly admitted its liability in the cases at bar.

The fact that the defendant's wire from which the infant plaintiff received his injuries was being maintained over a public highway, and was not on strictly private property, is too clearly established by the evidence to be open to serious question.

While a number of State Courts have been reluctant to adopt the wise and salutary rule of policy announced by this Court in the case of *Railroad Company* v. *Stout* (1873), 17 Wall., 657, in so far as negligent land owners were rendered liable for injuries sustained by children trespassing upon strictly private property, as in the *Stout* case, the overwhelming weight of authority supports this policy when applied to persons carelessly maintaining a dangerous instrumentality in or adjacent to the public highway. *Snare & Triest Co.* v. *Friedman* (1909), 169 Fed., 1, certiorari denied by this Court, 214 U. S., 518; *The Consolidated Electric Light Co.* v. *Healy*, 65 Kan., 798, 70 Pac., 884; *Temple* v. *McComb City Electric Light & Power Co.* (1907), 89 Miss., 1, 42 So., 874; *Ft. Wayne Northern Indiana Traction Co.* v. *Stark* (1920), 127 N. E., 460; *Williams* v. *Gas & Electric Co.* (1918), 274 Mo., 1; *Robertson* v. *Light & Power Co.*, 187 App. Div., 720; *Chesko, et al.* v. *Delaware & Hudson Co.* (1914), 218 Fed., 804; *Lynch* v. *Nurdin*, 1 Q. B., 29.

Even in jurisdictions like New York, where the doctrine of the *Stout* case has been declared inapplicable to injuries received by trespassing children upon *strictly private property*, *Walsh* v. *Fitchburg Railroad*, 145 N. Y., 301, recovery has been permitted where, as in the case at bar, defendant was carelessly maintaining a live wire over a public highway. *Robertson* v. *Light & Power Co.*, 187 App. Div., 720.

Moreover, as will hereinafter be shown, even if it were true, as erroneously asserted by defendant, that the wire in question was technically upon its own premises, its close proximity to the public highway, attached to a municipal bridge, where defendant knew children were in the habit of playing and were likely to be injured unless the wire were guarded, clearly brings the case within the doctrine of this Court first announced in *Railroad Company* v. *Stout* (1873), 17 Wall., 657, approved in *Union Pacific R. R. Co.* v. *McDonald,* 152 U. S., 262, and recently explained in *United Zinc & Chemical Company* v. *Britt,* decided March 27, 1922, but not yet reported.

SECOND POINT.

Upon the decisions of the Federal Courts, the defendant was under a legal duty to take reasonable steps to guard against injuries to children of tender years which were likely to occur because of the close proximity of the live wire to a place and structure alluring to children and about which, well known to the defendant, young children were in the habit of playing.

I.

While the common law imposed upon a land owner no duty to maintain his premises in a safe condition as against adult trespassers, but at most a duty not to intentionally or wantonly inflict harm upon them, according to many cases, or to avoid harming the trespasser whose presence was known by negligent acts which resulted in actually bringing force to bear upon his person, according to

other cases, this Court recognized at an early date that the duty towards trespassing children of tender years was of much greater scope.

In *Railroad Company* v. *Stout* (1873), 17 Wall., 657, this Court held that the defendant was liable for injuries sustained by a child six years of age while playing upon a turntable maintained unlocked on the defendant's premises, near a road without visible separation, where the evidence showed that children had been in the habit of playing upon the turnable, notwithstanding the child was technically a trespasser at the time of the injury.

In the recent decision of this Court in *United Zinc & Chemical Company* v. *Britt*, decided March 27, 1922, Mr. Justice Holmes, in stating the basis of the decision in the Stout case, declared:

> "In *Railroad Company* v. *Stout*, 17 Wall., 657, the well-known case of a boy injured on a turntable, it appeared that children had played there before to the knowledge of the employees of the railroad, and *in view of that fact and the situation of the turntable near a road without visible separation*, it seems to have been assumed without much discussion that the railroad owed a duty to the boy. Perhaps this was as strong a case as would be likely to occur of maintaining a known temptation, where temptation takes the place of invitation. A license was implied and liability for a danger not manifest to a child was declared in the very similar case of *Cooke* v. *Midland Great Western Ry. of Ireland* 1909 A. C., 229." (Italics ours.)

Since the decision in *Railroad Co.* v. *Stout*, scores of cases have been decided, both in the State and Federal courts, following the doctrine there laid down. While the courts in some States have

taken issue with the doctrine altogether, and others have limited it to dangerous things and situations maintained upon or contiguous to public highways, the doctrine has been repeatedly affirmed by the Federal courts and a majority of the state courts as applicable to things dangerous to children maintained unguarded upon strictly private property, as well as upon the public highway, where, as pointed out by this Court in the *Britt* case, *supra*, the allurement or attraction is visible to children playing in a public highway or other place where they have a right to be. As aptly stated by Mr. Justice Holmes in that case:

> "• • • While it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult."

See on this point the following cases:

Union Pacific R. R. Co. v. *McDonald*, 152 U. S., 262; *American Ry. Express Co.* v. *Crabtree*, 271 Fed., 287; *Chesko et al* v. *Delaware & Hudson Co.*, 218 Fed., 804; *Coeur d'Alene Lumber Co.* v. *Thompson*, 215 Fed., 8; *Hardy* v. *Missouri Pacific R. R. Co.*, 266 Fed., 860; containing a review of the State and Federal authorities.

The general doctrine commonly called the "turntable" or "attractive nuisance" doctrine has been explained by different Courts upon various theories. Some Courts have said that one who maintains upon his premises a thing or situation dangerous and alluring to children of tender years thereby impliedly invites them to come upon his

land and thus the general rule of non-liability to trespassers is sought to be avoided. Other Courts have declared that one maintaining upon his land a thing or situation dangerous and alluring to children of tender years is maintaining a "trap" and thus the case is brought within the rule that one is under a duty not to wilfully or wantonly injure a trespasser. Still other Courts have taken the position that a child of tender years is incapable of being a trespasser. But whatever may be the correct explanation of the doctrine, its essentials have been tersely and succinctly stated by the Circuit Court of Appeals, 8th Circuit, in the case of *Hardy* v. *Mo. Pacific Rd. Co.* (1920), 266 Fed., 860, at page 863, in the following language:

> "The essentials of the doctrine we deem to be, first, that the owner negligently maintains an agency which he knows or should know would be dangerous to children; second, that such agency is maintained at a place where the owner knows or should know children are likely to resort or to which they are likely to be attracted."

The essence of the doctrine is that it is not unlikely that children will come in contact with and be injured by the dangerous thing or situation, and that the defendant knew or should have known that such consequences were likely to result. Under these circumstances the law imposes a duty upon the one maintaining the dangerous thing or situation to take *reasonable* steps to prevent and guard against such consequences. The failure to employ reasonable means of prevention is negligence and for the resultant consequences the delinquent party is made responsible.

That this is the true basis of the doctrine is con-

firmed by the statement of the Circuit Court of Appeals, 2nd Circuit, in the case of *Heller v. N. Y., N. H. & H. R. R. Co.*, 265 Fed., 192, on page 198:

> "If the defendant ought reasonably to have anticipated that children would be likely to resort to this particular place to play, and, if they did, that they would be likely to be injured, it was guilty of negligence in maintaining the place in its exposed state. It is sufficient to authorize a recovery in cases of this nature if it appears that cautionary measures of a reasonable character would have prevented the injury complained of, and that such measures were not taken by the defendant. * * * Where there is uncertainty as to the existence of negligence, whether the uncertainty arises from the conflict in the testimony, or whether, the facts being undisputed, fair-minded individuals can honestly draw different conclusions from them, the question is for the jury."

See also the statement by that Court in its opinion affirming the judgments for the plaintiffs herein (fols. 464-5), as follows:

> "Since, so far as the Courts of the United States are concerned, these cases are all assumed to rest on *Railroad Co.* v. *Stout*, 17 Wall., 657, the word 'nuisance' is inappropriate. A nuisance is that which 'unlawfully worketh hurt, inconvenience or damage,' and neither the turntable of the Stout case nor the electric wire here to be considered was a nuisance; both were lawful enough. But many a lawful thing may be so negligently managed, handled or maintained as to give rise to causes of action in tort. The true doctrine is that any composition of matter which lures or attracts the confiding ignorance of child-

hood to its own harm must be safeguarded as circumstances require—and of course the circumstances vary in almost every instance."

II.

It is not plaintiffs' contention that defendant is an insurer against injuries caused such children trespassing upon its premises. The defendant's duty to take preventive action is predicated upon *notice* of facts which would warn a reasonable man that such injuries are likely to occur. Accordingly in the case of *United Zinc & Chemical Company* v. *Britt, supra,* since the pool which had formed on defendant's land was well within private property and was not visible from the highway or other place where children might reasonably be expected to be, nor, as stated by this Court, did it appear that children were in the habit of going to the place, the doctrine of the Stout case was declared inapplicable. Similarly in the case of *Hardy* v. *Missouri Pacific Railroad* (1920), 266 Fed., 860, since there was no evidence which tended to show any likelihood of children reaching the place of danger, the Court affirmed a directed verdict in favor of the defendant, declaring, at page 863:

"'Anticipation,' in the meaning of this doctrine, means probability, not possibility."

Likewise in the case of *Heller* v. *N. Y. N. H. & H. R. R. Co.* (1920), 265 Fed., 192, the Court sustained a verdict for defendant because on the evidence, as stated by the Court, the plaintiff's "extraordinary act was not one that defendant could be expected to have foreseen and which it could have anticipated."

The difference between the cases at bar and the

Britt, Hardy and *Heller* cases, referred to above, is, that in the instant cases the defendant had ample notice of the danger of its unguarded wire to young children which defendant knew were in the habit of climbing and playing upon the superstructure of the bridge within a few feet of its wire, and, therefore, was charged with notice that the injuries sustained by the infant plaintiff were likely to occur at any time, whereas, in the *Britt, Hardy* and *Heller* cases there was no evidence from which the jury could reasonably infer that an injury to children was probable. As stated in the opinion of the Circuit Court of Appeals herein (fols. 465-6):

> "That it was dangerous was too obvious for argument, and therefore if the danger was known and the temptation to children also known, and known to the defendant, it was a question for the jury to declare whether the absence of guards either human or mechanical did not constitute negligence.
>
> "This is the substance of our ruling in the Heller case, *supra*, where, as may be noted, the verdict of the jury had negatived negligence.
>
> "Whether a jury issue is presented in any given case depends upon a multitude of circumstances; we said in the Heller case that the plaintiff's 'extraordinary act was not one that defendant could be expected to have foreseen and which it could have anticipated' (p. 199). Considering the evidence in this case we conclude that there was evidence from which the defendant could have foreseen that some boy would in a spirit of bravado do exactly what this boy did, and under the Stout case just such troublesome boys are entitled to be protected against themselves."

III.

Furthermore the extent of defendant's duty after notice is not unlimited, but merely requires that such precautions be taken as are *reasonable under the circumstances.* As said by Mr. Justice Holmes in the *Britt* case, *supra,* "The doctrine needs very careful statement not to make an unjust and impracticable requirement." In determining what precautions may be reasonably exacted of a defendant, due consideration should be given to the feasibility of guarding against a particular danger. Thus the insulation of a power wire might not be an unreasonable requirement, whereas the insulation of a trolley wire or third rail would be an unreasonable requirement, because as a practical matter trolley wires and third rails cannot be insulated. This distinction is suggested in a recent decision by the Court of Appeals of New York, in *Adams* v. *Bullock* (1919), 227 N. Y., 208, at page 211, where Cardozo, J., states:

> "There is, we may add, a distinction, not to be ignored, between electric light and trolley wires. The distinction is that the former may be insulated. Chance of harm, though remote, may betoken negligence, if needless. Facility of protection may impose a duty to protect. With trolley wires, the case is different. Insulation is impossible."

It is upon this ground that cases like *Dickinson McAllister* v. *Henrich Jung,* 112 Ill. App., 138, relied upon by defendant (Petitioner's Brief, p. 17), may be explained. In that case the plaintiff, a boy, climbed defendant's elevated railway structure on which its elevated trains were operated by a bare third rail in the City of Chicago in quest of a ball

and was injured by coming in contact with the third rail. Furthermore the Court expressly stated in its opinion in that case, at page 141, "we find in the record no evidence tending to show that boys had been in the habit of climbing or playing upon the elevated structure."

For the same reason the case of *Reidel* v. *West Jersey Railroad*, 177 Fed., 374, relied upon by the defendant (Petitioner's brief, p. 16), is distinguishable. The facts were that the plaintiff's child had gone upon the defendant's tracks to pick flowers and there came in contact with an electric third rail. It appeared in that case that the Railroad Company had fenced its right of way in compliance with the statutes of the state and there was no evidence in the case to charge the defendant with notice that the place where the accident occurred was one which had been or was likely to be frequented by children. Further requirements would be both impracticable and unreasonable. The following passage from the Court's opinion, page 378, explains the decision:

> "There is nothing in the record to bring this case within the *ratio decidendi* of the so-called 'turntable' cases, and other cases decided on the same principle, to which the plaintiff refers. In the present case the railroad property was guarded by a statutory fence and the gate through which the plaintiff and his companion entered upon the railroad premises was fastened with a bolt, which had been withdrawn by them. There is no evidence that there was anything to allure or entice children to go upon the railroad premises at the place where the accident occurred, and none that children had ever been in the habit of entering upon the railroad premises through this

gate, or otherwise, for play or amusement, or for any other purposes."

In the case of *Erie R. R. Co.* v. *Hilt* (1917) 247 U. S., 97, relied upon by defendant (Petitioner's brief, p. 16), it appeared that a statute of New Jersey, where the accident occurred, precluded a recovery. Of course it is not denied that the Federal Courts must respect such statutes. See *Snare & Triest Co.* v. *Friedman*, 169 Fed., 1. Furthermore the facts in the *Hilt* case were that the child ran on to the defendant's railroad track to get a marble which the child had caused to roll under one of the defendant's cars. There was no evidence that the defendant was maintaining a dangerous thing or situation alluring to children or in close proximity to something which was alluring to children, or that children were in the habit of playing on the tracks or that it was likely that the child would do what the deceased did in that case.

In the case of *New York Central & H. R. R. Co.* v. *Price*, 159 Fed., 330, cited by defendant (Petitioner's brief, p. 16), the facts were practically the same as in the *Hilt* case. The child struck its plaything so that it fell on the track and ran after it on the defendant company's land where he was struck by a freight train. The Court merely decided that there was no duty on the part of the railroad company to fence its right of way and there was no evidence of negligence on the part of the carrier.

In the case of *National Metal Co.* v. *Agostini* (1919), 258 Fed., 109, relied upon by defendant (Petitioner's brief, pp. 16, 25), it appeared that a child, playing in the highway, threw a stick upon the ice in a nearby canal maintained by the de-

fendant. The child ran onto the ice and while attempting to recover the stick fell into a hole and was drowned. The Court said there was no evidence that children had been in the habit of playing on the ice or about the canal. Furthermore defendant was not negligent in failing to fence the canal. Such requirement would be unreasonable.

As above pointed out, the so-called attractive nuisance doctrine does not require that the defendant shall guard against injuries to children at whatever cost. The extent of the duty is limited to the taking of those precautions which it would be reasonable to require under the circumstances. Indeed the limits to every duty must be determined upon this basis. Accordingly the courts have generally held that, in the absence of statute, a railroad is under no duty to fence its tracks and yards against children who might be tempted to go upon its right of way to recover a plaything or to satisfy some other desire. Such a requirement would be unreasonable. Likewise it would be unreasonable to require one to fence a canal or pond or wall because, as stated in *McCabe* v. *American Woolen Co.* (1903), 124 Fed., 283, if a land owner is to be held for not especially guarding such objects, then the customs of the community must be changed throughout, because it is impossible to distinguish a canal from a river or a brook, a hay mow, an ox cart left in a farmer's yard, a high ledge or a field trench, about either of which children may be in the habit or accustomed to play. It is upon this basis that the following cases cited by defendant (Petitioner's Brief, at pages 17, 18, 19) were decided: *Papich* v. *Chi., M. & St. P. Ry Co.*, 167 N. W., 686; *Smalley* v. *Rio Grande Western Ry.*

Co., 98 Pac., 311; *Compton et al.* v. *Mo. Pac. Ry. Co.*, 126 S. W., 821; *Colby* v. *Chic. Jct. Ry. Co.*, 216 Ill. App., 315; *Blough* v. *Chic. Great W. R. Co.*, 179 N. W., 840; *Polk* v. *Laurel Hill*, 174 Pac., 414; *Troglia* v. *Butte Co.*, 270 Fed., 75; *Fusselman* v. *Yellowstone Valley Land & Irrigation Co.*, 163 Pac., 473; *Hageage* v. *District of Columbia*, 42 App. D. C., 109; *Coon* v. *Ky. R. R.*, 173 S. W., 325; *Heva* v. *Seattle School District No. 1*, 188 Pac., 776.

That the danger lurking in an uninsulated wire charged with a high voltage of electricity is not so patent, obvious and notorious as to bring the case within the principle of the above cited cases is shown not only by the numerous cases where children have been allowed to recover for injuries due to coming into contact therewith, but also by cases where adults have been permitted to recover for injuries occasioned in this manner. See *Braun* v. *Buffalo Electric Company* (1911), 200 N. Y., 484.

In the cases of *Kalman* v. *Cohen*, 203 Ill. App., 597; and *Hendricks* v. *Kans. So. Ry.*, 77 So., 130 (Petitioner's Brief, p. 17), the decisions were expressly placed upon the ground that defendant's pile of rags in the former case and defendant's turntable in the latter case were not the proximate cause of the injury.

The following cases, cited by defendant but not discussed (Petitioner's Brief, pages 17, 18, 19), are all distinguishable from the cases at bar, because in each case the Court pointed out there was no evidence of negligence upon the part of the defendant: See *Meyer* v. *Union Light, Heat & Power Co.*, 151 S. W., 941; *Fincher* v. *Chi., R. I. & P. Ry. Co.*, 78 So., 433; *Johnston* v. *New Omaha Thompson Houston Elec. Lt. Co.*, 110 N. W., 711; *Nichol* v. *Bell Tel. Co.*, 109 Atl., 649; *Louisville R. R. Co.*

v. *Ray*, 134 S. W., 858; *Texas Ry. Co.* v. *Garcia*, 216 S. W., 1108; *Sheffield Co.* v. *Morton*, 49 So., 772; *McDermott* v. *Burke*, 256 Ill., 401; *Simonton* v. *Citizens' Elec. Light & Power, et al.*, 67 S. W., 530; *Mayfield* v. *Webb*, 111 S. W., 712.

In the case of *Taylor* v. *Minneapolis & St. L. R. Co.*, 163 N. W., 405, cited by defendant (Petitioner's Brief, page 18), a verdict and judgment in favor of the plaintiff was affirmed on appeal. The plaintiff was injured while playing on the defendant's turntable, and the Appellate Court declared that whether it was negligence upon the part of the defendant to leave the turntable unguarded or unlocked was a question for the jury, and the jury's verdict was conclusive. Certainly this case is in full accord with the contentions of plaintiffs herein.

In the instant cases there was ample evidence that defendant not only had notice of the danger, but there was evidence that defendant might by a simple and inexpensive device, which would not interfere with the use of its property, have removed the danger to the infant plaintiff and other children whom defendant knew were constantly playing about its live wire. Whether the defendant had discharged its duty under the circumstances was a question for the jury, and its verdict, which was unanimously affirmed by the Circuit Court of Appeals, is conclusive on this point. See comment in 21 Columbia Law Review 724 approving the decision of the Circuit Court of Appeals herein.

THIRD POINT.

It was not necessary for the plaintiffs to prove that the structure and wire maintained by the defendant, as distinguishable from the city's bridge and defendant's strut, was alluring to children. It is sufficient that the defendant maintained a dangerous wire in close proximity to something which was alluring to children or in close proximity to a place where defendant knew, or should have known, children were likely to be attracted.

While in many of the so-called "attractive nuisance" cases the dangerous thing or situation maintained by the defendant was also attractive or alluring to children, this fact was a mere circumstance of the particular cases, and not essential to the plaintiffs' right to recover. It should be remembered that the basis of the defendant's liability is negligence. The negligence consists of a failure to take reasonable precautions to avoid injuries to children of tender years likely to result because of the maintenance of the dangerous thing or situation at a place where the defendant knew, or should have known, children were likely to be attracted. The probability of the child's coming in contact with the danger may be based upon the alluring character of the dangerous thing, or upon its close proximity to a place or thing alluring to children, or upon its close proximity to a place where the defendant knows children are in the habit of playing.

The question has been several times before the courts in States which have followed the doctrine

of *Railroad Co.* v. *Stout*, and in each instance the point has been resolved in favor of the plaintiff.

In the case of *The Consolidated Electric Light Co.* v. *Healy* (1902), 65 Kan., 798, 70 Pac. 884, the facts were strikingly similar to the cases at bar. Briefly stated, the facts were that the defendant Power Company was given permission by the city of Kansas City to carry its electric wires on a viaduct constituting a part of one of the streets. This the company did, by stringing them on timbers projecting out of the side of the viaduct or bridge. The sides of the bridge were guarded by a high railing or balustrade several feet high, running, substantially speaking, over the ends of the boards constituting the bridge floor. The electric wires alongside the viaduct were defectively insulated, their insulation covers having rotted away in many places. This fact the company knew. Small boys were in the habit of climbing over the viaduct railing and going dangerously near the electric wires. This fact the company also knew. A boy about ten years old climbed over the railing and came in contact with one of the electrically charged wires and was killed. According to the evidence, it appeared probable that the moment before he had been standing, or, rather, moving about, on the projecting ends of the bridge boards or the projecting wire supports. Suit was brought by his parents to recover damages for his death. Judgment was rendered in their favor in the court below, and the defendant appealed. The decision of the Court in this case has such an important bearing upon the rights of the plaintiffs in the cases at bar that the opinion of the Court is here set forth at length. Beginning at page 800, the Court said:

"The matter principally discussed is the question of the company's liability under the circumstances stated. As to the boy, who was not at the time on the highway proper, but who was engaged in a dangerous sport immediately outside of it, was the Company negligent in maintaining its wires in an uninsulated condition where he was liable to come in contact with them? To our minds there can be no doubt as to the answer. It was liable. To an adult it might not have been. To a small boy in the buoyancy of sport and lacking the intelligence, and discretion of older years, it was liable, in view of the fact that it knew that children of this class were in the habit of venturing in dangerous proximity to its negligently kept wires.

"The place where the boy met his death was one of those denominated in the books 'attractive nuisances,' the keepers of which according to those decisions which we regard as the sounder exposition of the law, are liable to one who, without inculpating fault on his part, is injured thereby. *It is true the Company did not maintain the bridge and the railing and the elevation above ground, constituting an attractive climbing-place for boys, and it may be that its wires were not themselves attractive playthings for the boys, but it maintained them in such immediate proximity to that which was attractive as to constitute them an integral part of the whole. It put its wires within the attractive environment. It identified itself in that way with the attractive place. If one maintains a dangerous instrumentality on his own premises immediately against the premises of another, and within the sphere of the attractive influence of something on the latter, and a third one, venturing on the latter, is injured by coming in contact with the former, he would seem entitled to a recovery; that is, assuming the necessary*

knowledge to charge the derelict party. The Electric Company had knowledge of this case. Its counsel attempted to explain that it had not, but it had. We have gone carefully through the evidence, and are convinced. * *

"It is immaterial that the viaduct railing and the elevation above ground may not have been dangerous. They probably were, but for reasons peculiar to themselves. The boy did not come to his death because of dangers incidental to the mere act of climbing. *Nor is it material that the Company's wires were not attractive. The attractions of the viaduct railing as a place for sport and the defectively insulated wires as instrumentalities of danger are united together as a whole.* We assume that the City is not liable, but, if it were charged with liability, it would be no answer to it to say that it did not furnish the element of danger. It would be sufficient to reply that it furnished the attraction to entice into danger. When the Company answers that it did not furnish the attraction, it is sufficient to reply that it furnished the danger to combine with the attraction. It could have neutralized the harmful ingredient of attractiveness in the compound by guarding against the danger, and to require it to do so, is not to impose upon it any greater burden than though it were responsible for both the hurtful constituents." (Italics ours.)

In the recent case of *Ft. Wayne & Northern Indiana Traction Co. v. Stark* (1920), 127 N. E., 460, decided by the Appellate Court of Indiana, the same question was presented. In that case it appeared that the defendant Company which was engaged in the business of furnishing, for profit, electricity for lighting and power purposes to the inhabitants of the City of Fort Wayne, had strung one of its wires so that it passed through the

branches of a tree located on private property, but very near the street; and at the point where the wire passed through the branches of the tree, the insulation had been, for at least two years prior to the accident, defective. The tree was located in a neighborhood where defendant knew that numerous children were in the habit of congregating and playing. The plaintiff, a child nine years of age, climbed into the tree, and thus came in contact with the wire and was thereby injured. The trial by jury resulted in a verdict and judgment for the plaintiff. On an appeal by the defendant the Court said (p. 460):

> "The one question involved in this appeal is whether or not the facts, as above stated, show actionable negligence on the part of appellant.
>
> "(1) Electricity is a dangerous force, and it is well established that Companies engaged in its generation and distribution, while not liable as insurers, to those who may come in contact with current carrying wires, are required to exercise reasonable care to keep such wires safely insulated. City of Decatur *v.* Eady, 186 Ind., 205, 115 N. E., 577, L. R. A., 1917; Denver Consolidated Electric Co. *v.* Simpson, 21 Colo., 371, 41 Pac., 499, 31 L. R. A., 566.
>
> "(2) It is the contention of appellant that appellee was a trespasser; that the wire in controversy was not a nuisance calculated to attract small children, and that, therefore, there can be no recovery. In other words, it is appellant's contention that, if it is liable to appellee for the injuries complained of, it must be upon the theory laid down in what is termed the 'turnable cases.' It is not the law, as assumed by appellant, that one who

maintains premises on which a dangerous thing is suffered to exist is not liable for injuries thereby resulting to children, unless such instrumentality is what is termed an 'attractive nuisance.' In 1 Thompson Neg., 944, the author in discussing the liability to children of one who suffers a dangerous agency to exist on his premises, correctly states the law as follows:

"'Although the dangerous thing may not be what is termed an attractive nuisance—that is to say, may not have an especial attraction for children by reason of their childish instincts—yet where it is so left exposed that they are likely to come in contact with it, and where their coming in contact with it is obviously dangerous to them, the person so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them from its being so exposed, and is bound to take reasonable pains to guard it so as to prevent injury to them." * * *

"It follows that if in the case at bar the improperly insulated wire, constructed, as it was, through the branches of the small tree, was obviously dangerous to persons coming in contact therewith, and if it can be said that appellant should reasonably have anticipated that children in their play would climb into the tree, and thus be exposed to the danger, then appellant would be liable to appellee for the injuries sustained, even though appellee was at the time a trespasser. It is not, therefore, necessary to decide whether appellee was or was not a trespasser at the time he was injured.

"The question presented by this appeal, though one of first impression in this State, has frequently been determined by the courts of appeal in other jurisdictions. The conclusion reached by such courts, which conclusion we approve, is well stated in a valuable text

on the law of electricity (Curtis Law of Electricity, Sec. 512) in the following language:

"'An electric company, maintaining a dangerous wire through or near a tree, is bound to anticipate that persons may lawfully climb the tree, and it is required to exercise due care to prevent injury to such persons from its wire. * * * The courts recognize that children are apt to climb trees, and impose upon electric companies the burden of using due care to keep their high tension wires insulated in places where children when climbing a tree, will come in contact with them.'

"We hold that under the facts set forth in appellee's complaint, and as shown by the evidence in this cause, the appellant should have anticipated that children would climb into the tree, through the branches of which it had stretched its wire, and that the maintenance of such wire with defective insulation was a breach of duty for which it was answerable to appellee in damages. Williams *v.* Springfield Gas & Electric Co., 274 Mo., 1, 202 S. W., 1; Temple *v.* McComb City Electric Co., 89 Miss., 1, 42 South 874, 11 L. R. A. (N. S.), 449, 119 Am. St. Rep., 698, 10 Am. Cas., 924. See also Thompson *v.* Tilton Electric etc., Co., 77 N. H., 92, 88 Atl., 216."

Other cases in point and reaching the same conclusion are *Temple* v. *McComb City Electric Light and Power Co.* (1907), 89 Miss., 1, 42 So., 874; *Daltry* v. *Media Electric Light & Heat & Power Co.*, (1904), 208 Pa. St., 403, 57 Atl., 833; *Talkington* v. *Washington Water Power Co.* (1917) 96 Wash., 386; *Williams* v. *Gas & Electric Co.* (1918) 274 Mo., 1.

In the case of *Graves* v. *The Washington Water Power Co.* (1906) 44 Wash., 675, 87 Pac., 956, relied upon by defendant (Petitioner's brief, pp. 16-

17), it is true that the Court denied a recovery to a boy who climbed the steel frame of a bridge in search of birds' nests and came in contact with the defendant's exposed wires attached to the steel support. Because of the coincidence that in this case, like the instant cases, the plaintiff was climbing a bridge in search of birds' nests, one is likely to assume that this decision is an authority against the contentions of the plaintiffs herein. But a careful examination of the facts and decision in that case reveals that the case is clearly distinguishable.

In the Graves case the Court expressly declared (p. 608):

> "The evidence does not show that appellant had actual knowledge of boys climbing these piers; nor that there was such an amount of climbing near the wires as would impute knowledge to it thereof."

Furthermore in the subsequent case of *Talkington* v. *Washington Water Power Co.* (1917), 96 Wash., 386, the same Court allowed a recovery where the plaintiff, a child ten years old, had climbed upon the roof of a grain warehouse and there came in contact with the live wire maintained by the defendant which passed over the roof of the storehouse, it appearing, as stated by the Court, that "boys of the town had been in some degree in the habit of playing on the roof of the lean-to and also on the roof of the main building on that side for some time previous to the time William Talkington received his injuries."

Counsel for the defendant in that case, as does the defendant in the cases at bar, relied upon the decision in *Graves* v. *Washington Water Power Co.* referred to above. But the Court distinguished

the *Graves* case by pointing out that in that case there was no evidence which showed that boys had ever been known to climb the bridge piers.

The defendant lays great stress upon the infant plaintiff's testimony about pigeons' nests and pigeons. As a matter of fact, the evidence shows that the primary attraction was the bridge and defendant's strut, with its beams and trellis work on which the children were accustomed to play follow-the-master, tag and other childish games. The point is not material, however, as it makes no difference that the plaintiff may have been partly motivated by the desire to search for pigeons' nests in the framework of the bridge. The evidence is uncontradicted that defendant knew that children were in the habit of climbing this bridge, whatever may have been their motive, and were therefore likely to come in contact with its wire, and hence the sole question was whether they were negligent in not anticipating and taking reasonable precautions to prevent the kind of injury which the plaintiff sustained.

FOURTH POINT.

The remaining contentions of the defendant with reference to the essentials of the attractive nuisance doctrine are unsound.

The defendant's contention that in order to make out a case under the attractive nuisance doctrine, it is necessary for the plaintiff to show that the particular instrumentality which caused the injuries was easily accessible, finds no support whatsoever in the authorities.

In those jurisdictions where the attractive nuisance doctrine has met with approval, it has been

repeatedly held that the mere fact that the children found a lurking danger difficult of approach, even though coupled with the fact that the child by his own deliberate act attempts what to an adult would be obviously dangerous, is immaterial. These cases also hold uniformly that the plaintiff is not in any way required to make proof of any license or invitation to the child to come upon the premises or structure where the danger exists. The important circumstance, according to the authorities, many of which have already been discussed at length in the foregoing part of this brief, is not whether the approach is easy and safe, or whether the child acted deliberately or not, or whether the child was invited on the premises, but whether in view of the evidence it is likely that children will be attracted to the place where the dangerous thing or situation is being maintained.

The record in this case is full of evidence to the effect that children had been in the habit of playing about the bridge, that they were constantly climbing upon the girders and trellis work and that they had on many occasions climbed upon the very strut on top of the bridge to which the defendant's wires were affixed. Defendant's own evidence shows conclusively that it had notice of this fact and that it anticipated that these boys might be injured by coming in contact with this wire.

Defendant's contention that it is not liable because its wire was not easily accessible is conclusively refuted by the following cases: *Robertson* v. *Rockland Light & Power Co.* (1919), 187 App. Div., 720; *Edwards* v. *Kansas City* (1919), 104 Kan., 681; *Electric Light Co.* v. *Healy* (1902), 65 Kan., 798; *Ft. Wayne & Northern Indiana Traction Co.* v.

Stark (1920), 127 N. E., 460; *Temple* v. *McComb City Electric Light & Power Co.* (1907), 89 Miss., 1; *Talkington* v. *Washington Water Power Co.* (1917), 96 Wash., 386; *Williams* v. *Gas & Electric Co.* (1918), 274 Mo., 1.

The above cited cases, which vary considerably as to the facts, are all cases where a recovery under the attractive nuisance doctrine was sustained although the children had climbed telegraph poles, trees, bridges, and warehouses, and had come in contact with wires affixed thereto. In each of these cases the danger was neither close to the ground nor access thereto easy and safe.

It is also worthy of note that in none of these cases did the court regard the deliberate act of the child in attempting to make a perilous climb of the pole, tree, warehouse or bridge, as severing the casual connection between the defendant's negligence and the plaintiff's injury.

The contention of defendant, made on page 26 of its brief, that because the evidence shows that the wire was maintained pursuant to the prevailing practice, the plaintiff is therefore debarred from recovery as a matter of law, is unsound. While it is not denied that evidence that the defendant maintained the wire in question pursuant to the prevailing practice, is proper evidence to be considered by the jury upon the question of negligence, it is not conclusive because it is possible that in a community the prevailing practice may be a negligent one (see, *C. M. & S. R. R. R.* v. *Moore*, 166 Fed., 663). Furthermore the failure to insulate or otherwise guard wires at other points or bridges along the defendant railroad may not constitute negligence whereas the failure to insulate

or otherwise guard the wires at the particular bridge in question, in view of the attendant circumstances, may constitute negligence.

FIFTH POINT.

The defendant's duty in the premises was in no sense diminished by Section 93 of the Railroad Law of New York.

The defendant urges on page 15 of its brief that inasmuch as Section 93 of the Railroad Law of New York imposes upon a Railroad Company the duty of keeping the frame work and abutments of its overhead bridges in repair, that this duty is exclusive, and that consequently, and by reason of the said statute, the railroad is excluded from all other duties toward the public with reference to this bridge.

The plaintiffs in these cases do not contend that the railroad has been delinquent in keeping the frame work and abutments of the bridge in repair as required by Section 93 of the Railroad Law of New York, but rather that it has failed to comply with the duty which it owed to the plaintiffs to take reasonable precautions with reference to its live wires so that such injuries as the infant plaintiff suffered might have been avoided. On the subject of the care and maintenance of the wires, Section 93 of the Railroad Law is entirely silent.

There is not a single word in the statute to justify the entirely unwarranted assumption by the defendant that the statute was intended to limit the duties of the defendant with reference to the bridge as a whole. Indeed, the mere reading of Section 93 makes it abundantly plain that the

statute was merely intended to declare certain affirmative duties and is in no sense a declaration that the enumerated duties are exclusive and that having complied therewith, the railroad may entirely disregard duties of every name, nature and description theretofore existing and arising by principles of common law.

Were the contention of the defendant sound in this respect, it might negligently run its live wires along the very roadway of the bridge, or carelessly leave a package of dynamite or some other dangerous object on or near the roadway of the bridge, without becoming liable to a person injured by such negligence.

As the language of the statute plainly indicates, it was intended to state the duties of the defendant with respect to the maintenance of "*the frame work of the bridge and its abutments*" and does not purport to affect directly or indirectly the duties or obligations of the defendant in any single other respect.

SIXTH POINT.

It is well settled that the question of liability for negligence when not modified or regulated by statute, is one of general common law and the Federal Court is not bound to follow the decisions of the State Court. Furthermore the New York decisions sustain the judgments in these cases.

It has been repeatedly held by this Court that the Federal Courts are not bound to follow the decisions of State tribunals with respect to questions of general common law not affected by State

statutes, except as to rights and titles to things having a permanent locality, such as the rights and title to real estate and other matters immovable and intraterritorial in every nature and character. *Swift* v. *Tyson* (1842), 16 Peter, 1. Specific decisions have applied this rule to negligence cases. *Gardner* v. *Michigan Central Railroad Co.*, 150 U. S., 349; *Railroad Co.* v. *Lockwood*, 17 Wall., 353; *Hough* v. *Railway Co.*, 100 U. S., 213. See 22 Columbia Law Review 77 for a discussion of recent decisions applying the rule.

The case of *Snare & Triest Co.* v. *Friedman*, 169 Fed., 1, cited in petitioner's brief, page 28, and so strongly relied upon by it would seem to be an authority directly supporting the contention of the plaintiffs on this point. (To the same effect see *Chesko, et al.* v. *Delaware & Hudson Co.*, 218 Fed., 804.) In the *Snare & Triest* case, the Federal Court allowed a recovery under the attractive nuisance doctrine, notwithstanding the fact that the highest court of the State in which the case arose had denied a recovery under identically the same facts. In that case the facts were that the defendant piled certain heavy beams on the sidewalk in front of a lot, which it had a right to do. It appeared that the beams had been piled in an insecure manner. The plaintiff, a child of tender years, was accustomed to play with other small children in the street near such piles and they frequently climbed or sat upon the same. The plaintiff and other children playing upon the pile caused it to fall, and the plaintiff was struck by it and injured.

Two actions were brought against the defendant in the Supreme Court of New Jersey, one by the plaintiff's father and the other by the plaintiff,

both complaints charging the defendant with negligence. The plaintiffs obtained judgments in both actions. In the judgment in the case of the father, a writ of error was sued out by the defendant from the Court of Errors and Appeals of the State of New Jersey and in the child's case the judgment *nisi* being entered, a rule to show cause why the verdict should not be set aside was granted returnable before the New Jersey Supreme Court. The father's case was duly argued before the New Jersey Court of Errors and Appeals and the judgment appealed from was finally reversed (*Friedman* v. *Snare & Triest Co.*, 71 N. J. Law, 605). The ground of this reversal, as stated in the opinion of the Court, was that the defendant owed no duty to children of tender years to whom, to its knowledge, these piles of beams might be attractive for playing upon, to keep them in a reasonably safe condition other than it owed to those who were *sui juris*. It was accordingly held that the child was a trespasser upon these materials of the defendant and that for the injury suffered by her as such, no cause of action or recovery could accrue to her father.

After this judgment of the Court of Errors and Appeals in the case of the father, as was inevitable, the rule to show cause why the new trial should not be granted in the case of the infant plaintiff against the same defendant was made absolute by the Trial Court, and the suit was thereafter discontinued by the plaintiff and a new action was brought in behalf of the child in the Federal Court. At the trial in the Federal Court upon substantially the same evidence as that adduced in the State Court, the plaintiff obtained a judgment from which the defendant appealed.

When the case was before the Circuit Court of Appeals, the defendant contended, as does the defendant now contend in the case at bar, that the Federal Court was bound to follow the decision of the highest court of the State which had repudiated the so-called "attractive nuisance" or "turntable" doctrine. The Circuit Court of Appeals after pointing out that this question was one of general common law, decided that the Federal Court was free to form its own independent judgment as to what were the common law rights of the plaintiff *and it was not bound to follow the adverse decision of the Court of Errors and Appeals on identically the same facts.*

While it is true the Court intimated, by way of *dictum,* that as a matter of judicial comity, the Federal Court might bow to a line of decisions in the State Courts so uniform and well settled and extending through so long a time, as to establish a rule of conduct "which it would be wrong to disturb," there is no such uniform and well settled line of decisions in New York unfavorable to the plaintiffs in the cases at bar. On the contrary the New York decisions uphold the recovery by the plaintiffs in the instant cases.

It may be interesting to trace the development of the law on this question in the New York State courts. The Court of Appeals in *McAlpin* v. *Powell,* 70 N. Y., 126, criticized, and in *Walsh* v. *Fitchburg Railroad Co.,* 145 N. Y., 301, decided, that the so-called turntable doctrine was not applicable to a railroad maintaining a turntable on *strictly private property.*

In the case of *Johnson* v. *City of New York,* 208 N. Y., 77, cited in defendant's brief, pp. 27-29, the Court approved the decision in *Walsh* v. *Fitch-*

burg Railroad Co., 145 N. Y., 301, but conceded that the rule of that case was not applicable to a similar situation *in a public street*, and the decision for the defendant was expressly based upon "the absence of evidence tending to show that the defendant was chargeable with notice of some special danger to children in the conditions which existed" (see p. 83 of the opinion).

Accordingly the Appellate Division in the recent case of *Robertson* v. *Light & Power Co.*, 187 App. Div., 720, decided that the plaintiff, a boy eleven years of age, might recover for injuries caused by coming in contact with an uninsulated wire maintained by the defendant on a pole in the public highway, he having climbed said pole by means of steps which were maintained near the ground. As stated by the Court in that case (p. 728):

> "Counsel for the Power Company relies on *Walsh* v. *Fitchburg Railroad Co.* (145 N. Y., 301), as holding that in this State there is no liability to a trespasser for the maintenance on one's own land of a so-called nuisance attractive to children, such as a turntable, and he argues that the pole was on the private property of his client, and that, therefore, the plaintiff in climbing the pole was a trespasser, and that doctrine exonerates the power company from liability. *I think there is a material difference between trespassing upon private premises and using private property left unguarded and unattended either temporarily or permanently in a public highway* (See *McAlpin* v. *Powell*, 70 N. Y., 126; *Beck* v. *Carter*, 68 *id.*, 283; * * *. (Italics ours.)

The evidence of defendant's negligence in the *Robertson* case was not nearly so strong as in the

instant cases and yet the Appellate Court held it was error to dismiss the complaint.

This is the latest expression of the New York Courts as to the law of that State, in a case like the one at bar. There is no decision of the Court of Appeals to the contrary.

In the earlier decision of *Freeman* v. *Brooklyn Heights R. R. Co.*, 54 App. Div., 596 (see Petitioner's Brief, p. 29), the plaintiff was injured by coming in contact with a guard wire which was intended to be a dead wire and defendant was not shown to be responsible for the fact that at the time of the accident it had in some undisclosed manner become charged with electricity. The following excerpt from the opinion of the Court makes this point clear (p. 598):

> "The alleged negligence of the defendant is predicated upon the fact inferable from plaintiff's evidence that the guard wire was charged with electricity at the time of the contact with the boy, but the evidence is wholly lacking to show that this was due to any negligence on the part of the defendant."

Furthermore, as pointed out in the *Robertson* case (p. 729):

> "The case of *Freeman* v. *Brooklyn Heights Railroad Co.* (54 App. Div., 596), is not in point, for there the decision was placed mainly upon the ground that the wire with which the plaintiff came in contact was intended to be a dead wire, and defendant was not shown to be responsible for the fact that at the time

> of the accident it had in some undisclosed manner become charged with electricity * * *."

The other New York cases cited in defendant's brief, page 29, are all distinguishable in that the alleged dangerous thing was maintained upon *strictly private property* and thus came within the rule of *Walsh* v. *Fitchburg Railroad Co.*, 45 N. Y., 361.

If it be said that the decision in the *Robertson* case is inconsistent with the decision in the *Freeman* case, as to the law of New York, it follows that with the Appellate Divisions of the First and Second Departments disagreeing as to what is the law of New York, it cannot be said that the decisions in the State courts are so uniform and well settled and extending through so long a time as to establish a rule of conduct "which it would be wrong to disturb" and, therefore, the Federal Court is free to exercise its independent judgment in declaring what are the common law rights of the plaintiffs in the case at bar.

In this connection it is not amiss to call attention to the fact that the plaintiffs herein, relying upon their right to recover under the New York decisions, commenced their actions in the Supreme Court of New York. The defendant removed the cases to the Federal Court. (See Petitioner's Brief, p. 5.) If the New York decisions are so favorable to defendant, as stated in its brief (see Petitioner's Brief, p. 29), it is difficult to understand why defendant removed the cases to the Federal Court.

CONCLUSION.

The judgments should be affirmed, with costs.

Dated, New York City, April 7, 1922.

Respectfully submitted,

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NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY v. FRUCHTER, AN INFANT, &c.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY v. FRUCHTER.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 35, 36. Argued October 6, 9, 1922.—Decided November 13, 1922.

A boy of eight years, by climbing to the topmost girder of a municipal bridge used for conveying a street across a railroad, and thence up a latticed tower, touched a live electric wire twenty-nine feet above the street, and was injured. *Held*, upon the circumstances stated in the opinion, that the railroad company, (which maintained the wires and the bridge framework,) could not be deemed liable upon the theory of license or invitation. P. 143. *United Zinc Co.* v. *Britt*, 258 U. S. 268.

271 Fed. 419, reversed.

CERTIORARI to judgments of the Circuit Court of Appeals, affirming judgments in the District Court against the petitioner, in two actions for personal injuries.

Mr. James W. Carpenter for petitioner.

The attractive-nuisance doctrine was not applicable, for defendant owed the plaintiff no active or affirmative duty. Defendant's duty to the public in relation to the bridge was confined by statute to maintenance of the bridge superstructure as such, and no negligence in whole or in part could be predicated on its attractiveness to children. There was no excuse nor justification for plaintiff's trespass on defendant's property, since (a) it was not attractive or alluring to him,—the bird attracted him, the property was a mere incident; (b) the relative inaccessibility of the property and the obvious danger in-

volved in scaling the intervening bridge superstructure was notice to all, having the physical capacity to reach it, of defendant's intent to use and occupy it exclusively; (c) the attitude of both the city and the defendant was forcibly resistant to the public use of the respective properties as a play or hunting ground; and (d) defendant had no notice of any use of its property by boys. Furthermore, there was no proof that either insulation or the evidential protective devices would not seriously interfere with the wires' functions in interstate commerce.

The New York rule of non-liability to infant trespassers or licensees for injuries received from inherent dangers in private premises is so thoroughly established that it has become a fixed rule of property and action by which the courts below were bound in comity. National interests require the affirmation of the principle declared by the Court of Appeals for the Third Circuit. 169 Fed. 1.

If the defendant owed the infant any duty, there was no evidence of negligence.

Mr. Harold R. Medina, with whom *Mr. Leon Sanders*, *Mr. George M. Curtis, Jr.*, *Mr. Young B. Smith* and *Mr. Jacob Zelenko* were on the brief, for respondents.

The defendant's liability is governed by those rules of law applicable to persons maintaining a dangerous thing in or adjacent to a public highway.

Upon the decisions of the federal courts, the defendant was under a legal duty to take reasonable steps to guard against injuries to children of tender years which were likely to occur because of the close proximity of the live wire to a place and structure alluring to children and about which, well known to the defendant, young children were in the habit of playing.

It was not necessary for the plaintiffs to prove that the structure and wire maintained by the defendant, as distinguishable from the city's bridge and defendant's strut,

were alluring to children. It is sufficient that the defendant maintained a dangerous wire in close proximity to something which was alluring to children or in close proximity to a place where defendant knew, or should have known, children were likely to be attracted.

The remaining contentions of the defendant with reference to the essentials of the attractive-nuisance doctrine are unsound.

The defendant's duty in the premises was in no sense diminished by § 93 of the Railroad Law of New York.

It is well settled that the question of liability for negligence when not modified or regulated by statute, is one of general common law and the federal court is not bound to follow the decisions of the state court. Furthermore, the New York decisions sustain the judgments in these cases.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Since 1908, One Hundred and Forty-Ninth Street, New York City, has been carried over and across the tracks of the New York, New Haven & Hartford Railroad by a public municipal steel truss bridge of standard construction. The bridge is fifty-four feet wide, two hundred and seventy feet long and is formed of posts, beams, girders, etc., connected and strengthened by trellis or lattice work. The top girders, or beams, are twenty-three feet above the street. The local law imposes upon the railroad the duty of maintaining the framework; the municipality is required to keep the roadway in repair.

Fastened to the top girder at the end of the bridge are two upright steel lattice towers, posts or struts. Cross arms attached to these six feet above their bases, support bare wires carrying electric current used for operating trains. The nearest wire is nineteen inches from the strut.

With considerable difficulty and some danger active boys can climb to the highest parts of the bridge. They did often climb upon it; some reached the struts. They were frequently chased away by a policeman and the railroad guard, and seem generally to have understood that to play there was forbidden; when an officer came in sight they kept off. At each corner of the bridge there was a notice board displaying the words: "Live wires, Danger, Keep Off."

In June, 1916, the plaintiff David Fruchter, eight years old, by using the trellis work climbed from the street to the top of the bridge in quest of a bird's nest. He then saw a bird on the wire above and to catch it climbed up the strut and reached out; the bird flew away; his hand touched the wire and severe injuries resulted. He sued for damages; and the father also seeks to recover for loss of services and expenses incurred. The causes were tried together. The Circuit Court of Appeals affirmed judgments for the plaintiffs February, 1921. 271 Fed. 419.

At the time of the accident the boy was attending school. Whether he could then read the warning words upon the notice boards is left in doubt; upon the witness stand he both affirmed and denied that he could. He further stated that before climbing upon the bridge he looked to see whether a policeman was present, and admitted that if one had been there he would not have gone up.

The court below accepted the theory that the jury could have found the structure was well known to be both dangerous and attractive to children and that failure to supply proper guards, human or mechanical, constituted negligence within the doctrine of *Railroad Co.* v. *Stout*, 17 Wall. 657, and *Union Pacific Ry. Co.* v. *McDonald*, 152 U. S. 262.

In *United Zinc & Chemical Co.* v. *Britt*, 258 U. S. 268, 275, we pointed out the theory upon which liability may

exist for injuries suffered by an infant although the circumstances would give no cause of action to an adult. "Infants have no greater right to go upon other peoples' land than adults, and the mere fact that they are infants imposes no duty upon landowners to expect them and to prepare for their safety. On the other hand the duty of one who invites another upon his land not to lead him into a trap is well settled, and while it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult. . . . There can be no general duty on the part of a landowner to keep his land safe for children, or even free from hidden dangers, if he has not directly or by implication invited or licensed them to come there."

Considering the peculiar circumstances of the present cause, it is clear that if the plaintiff had been an adult he could not recover; and we are unable to find any sufficient evidence from which the jury could have properly concluded that the railroad company either directly or by implication invited or licensed him to climb upon the strut to a point from which he could touch the bare wire thirty feet above the street. The motion for an instructed verdict should have been granted.

The judgment of the court below is reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.